SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

MRS. MARGARET SHEA LYNCH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Fifth Circuit	1	1
Caption (omitted in printing)	1	
Record from D. C. U. S., Middle District of Georgia	2	1
Caption (omitted in printing)	2	
Complaint	3	1
Exhibit "A"—Letter from Veterans Administration, March 29, 1933	16	11
Affidavit and order allowing complainant to prosecute action without prepayment of costs	17	12
Acknowledgment of service	18	12
Demurrer	19	13
Amendments to complaint	21	14
Order sustaining demurrer	24	17
Petition for appeal	25	17
Pauper affidavit	28	19
Order granting appeal	29	20
Assignments of error	30	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 7, 1934.

	Original	Print
Citation ..... (omitted in printing)	33	
Præcipe for transcript of record	34	22
Agreement to præcipe	35	23
Acknowledgment of service	36	23
Clerk's certificate ..... (omitted in printing)	37	
Minute entry of argument and submission (omitted in printing)	38	
Opinion, Foster, J.	39	24
Judgment	42	26
Petition for rehearing	43	26
Order denying rehearing	46	28
Clerk's certificate ..... (omitted in printing)	47	
Order allowing certiorari	48	29

[fols. 1 & 1a] [captions omitted]

[fols. 2-2b]

IN UNITED STATES DISTRICT COURT FOR THE ALBANY DIVISION OF THE MIDDLE DISTRICT OF GEORGIA

MRS. MARGARET SHEA LYNCH, Complainant, Appellant,

versus

THE UNITED STATES, Defendant, Appellee

[fol. 3] COMPLAINT—Filed April 21, 1933

The petition of Mrs. Margaret Shea Lynch respectfully shows:

Count One

1

That petitioner is a citizen of the United States of America, residing within said district of said state.

2

This suit is brought against the United States of America under the laws of the United States, and particularly arising under the World War Veterans Relief Laws, on a contract of United States War Risk Insurance issued to Thomas Stephen Lynch, late of Albany, Georgia, the son of petitioner, now deceased.

3

Said Thomas Stephen Lynch, hereinafter called the insured, enlisted for four years, or for the duration of the war, in the United States Navy, on the 30th day of May, 1918, and was released from active duty on —— —, 1919.

4

That during said period of said naval service, desiring to be insured against the risk of death and permanent disability, the insured applied for a policy of war risk insurance in the sum of $10,000.00, naming therein your petitioner as beneficiary; and thereafter said policy was duly issued to the insured.

[—fol. 4—]

[fol. 4] 5

That there was deducted by defendant from the monthly pay of the insured the premiums on said policy of insurance until the discharge from service of the insured, and that thereafter the insured remitted to the defendant the monthly installments of premiums due on said policy up to and including the month of July, 1919.

6

That the premium due on August 1, 1919, was not paid, by the insured, and said insurance lapsed for non-payment of premiums on September 1, 1919, unless said policy of insurance matured before that date.

7

That during the life of said insured, and before any default in payment of premiums, the insured became totally and permanently disabled from following continuously any substantially gainful occupation, as a result of active pulmonary tuberculosis contracted during his service in the U. S. Navy.

8

That by reason of the foregoing the insured became and was totally and permanently disabled on or before the 1st day of September, 1919, and became entitled to recover from defendant, under the terms of said contract of insurance, the sum of $57.50 per month for each month thereafter, for a period of two hundred forty (240) months.

9

That as a result of said active pulmonary tuberculosis the insured died, intestate, on the 27th day of November, 1924, without having collected said insurance, and without having married; and same is now payable to your petitioner as beneficiary thereof.

[fol. 5] 10

That your petitioner made due proof of said death to the defendant, furnishing the statutory death certificate, and requested payment of aforesaid amounts.

11

That on or about September 8, 1932, the defendant called on petitioner to furnish supporting evidence from the physician who attended and treated the insured during his last illness, showing the condition of the insured when examined by said physician prior to the death of the insured, and also called on petitioner for additional evidence in support of said claim.

12

That pursuant to said requests petitioner did obtain and submit a certificate and an affidavit of said physician, and numerous affidavits of friends and business associates of the insured, touching his physical condition during the time between his discharge and his death; that on February 20, 1933, petitioner presented, through her attorney, the evidence and a brief of the law to the Insurance Claims Council, Veterans' Administration, at Washington, D. C.; and that said Council thereafter had the said claim under consideration.

Petitioner shows, however, that the defendant did, on the 29th day of March, decline and refuse to pay said claim. A copy of the letter denying said claim is hereto attached and made a part of this petition, marked Exhibit A.

13

That by reason of said denial of the claim, a disagreement has arisen under said contract of war risk insurance between petitioner and defendant.

[fol. 6]

14

That the provisions of the act of Congress of March 20, 1933, entitled, "An act to maintain the credit of the United States Government," specifically repealed all laws granting or pertaining to yearly renewable term insurance, except as to causes wherein contracts of yearly renewable term insurance have matured prior to March 20, 1933, and under which payments have been commenced or in which judgments have been rendered in a court of competent jurisdiction or any suit on a contract of yearly renewable term insurance or in which judgment may hereafter be rendered in any suit then pending.

That said act is retroactive and retrospective in its scope, is discriminatory and unreasonable, and violates Amendment V of the Constitution of the United States of America, which provides: "No person shall * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

15

That the provisions of said Act of Congress of March 20, 1933, as follows:

"Title I, Sec. 1. That subject to such requirements and limitations as shall be contained in regulations to be issued by the President, and within the limits of appropriations made by Congress, the following classes of persons may be paid a pension," and in Sec. 3 thereof, "The President is authorized to prescribe by regulation the minimum degrees of disability and such higher degrees of disability as in his judgment should be recognized and prescribe the rate of pension payable for each such degree of disability," violate Article I, Sec. 1, of the Constitution of the United [fol. 7] States of America, which provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and that said sections are, therefore, invalid and void.

16

That the provisions of the Act of Congress of March 20, 1933, as follows:

"Sec. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision," violate Article III, Sec. 1, of the Constitution of the United States of America, which provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," and further violates Amendment V of the said Constitution, which provides: "No person shall * * * be deprived of life, lib-

erty, or property without due process of law; nor shall private property be taken for public use without just compensation."

17

That the provisions of said act of Congress of March 20, 1933, as follows:

"Sec. 5. The Administrator of Veterans' Affairs is hereby authorized in carrying out the provisions of Title I of this act or any other pension act to delegate authority to render decision to such person or persons as he may find necessary. Within the limitations of such delegations, [fol. 8] any decisions rendered by such person or persons shall have the same force and effect as though rendered by the Administrator of Veterans' Affairs. The President shall personally approve all regulations issued under the provisions of this title," violate Article III, Sec. 1, of the Constitution of the United States, which provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," and further violates Amendment V of said Constitution, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

18

That the provisions of the Act of Congress of March 20, 1933, as follows:

"No person who is entitled to any benefits under this title shall participate in any determination or decision with respect to any claim to benefits under this title," violates Article IV, Sec. 2, of the Constitution of the United States, which provides: "The citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states," and further violates the provisions of Amendment V of said Constitution which provides: "No person shall * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation," and further is discriminatory, unreasonable, and therefore, void.

[fol. 9] 19

Petitioner shows that she is entitled, as beneficiary under said policy, to a judgment against the United States of America for the said principal sum of $57.50 per month commencing August 1, 1919, for a total period of two hundred forty (240) months, the defendant being indebted to your petitioner by reason of the foregoing facts.

Wherefore, petitioner prays that she do have and recover a judgment against the United States in said sum, and that she do have a jury trial of this case.

Count Two

1

That petitioner is a citizen of the United States of America, residing within said district of said state.

2

That this suit is brought against the United States of America under the laws of the United States, and particularly arising under the World War Veterans Relief Laws, on a contract of United States War Risk Insurance issued to Thomas Stephen Lynch, late of Albany, Georgia, the son of petitioner, now deceased.

3

Said Thomas Stephen Lynch, hereinafter called the insured, enlisted for four years, or for the duration of the war, in the United States Navy, on the 30th day of May, 1918, and was released from active duty on ——, 1919.

[fol. 10] 4

That during said period of said naval service, desiring to be insured against the risk of death and permanent disability, the insured applied for a policy of war risk insurance in the sum of $10,000.00, naming therein your petitioner as beneficiary; and thereafter said policy was duly issued to the insured.

5

That there was deducted by defendant from the monthly pay of the insured the premiums on said policy of insur-

ance until the discharge from service of the insured, and that thereafter the insured remitted to the defendant the monthly installments of premiums due on said policy up to and including the month of July, 1919.

6

That the premium due August 1, 1919, was not paid by the insured and said insurance lapsed for non-payment of premiums on September 1, 1919, unless the insured was suffering from a compensable disability for which compensation was not collected and said insured was entitled to said compensation remaining uncollected.

7

That during the life of said insured, and before any default in the payment of premiums, the insured suffered from active pulmonary tuberculosis, which was a compensable disability, and said compensation was not collected during the life of the insured, although the insured was entitled to the same. That said active pulmonary tuberculosis was contracted by the insured during his said naval service.

[fol. 11] 8

That by reason of the foregoing, said uncollected compensation, computed at the rate provided by section 302 of the War Risk Insurance Act, as amended on December 24, 1919, Chapter 16, 41 Statutes, page 371, would and did purchase, if applied as premiums when due, the full amount of $10,000.00 insurance represented by said policy.

9

That as a result of said active pulmonary tuberculosis the insured dies, intestate, on the 27th day of November, 1924, without having collected said insurance, and without having married; and same is now payable to your petitioner as beneficiary thereof.

10

That your petitioner made due proof of said death to the defendant, furnishing the statutory death certificate, and requested payment of aforesaid amounts.

11

That on or about September 8, 1932, the defendant called on petitioner to furnish supporting evidence from the physician who attended and treated the insured during his last illness, showing the condition of the insured when examined by said physician prior to the death of the insured, and also called on petitioner for additional evidence in support of said claim.

12

That pursuant to said requests petitioner did obtain and submit a certificate and an affidavit of said physician, and numerous affidavits of friends and business associates of the insured, touching his physical condition during the time between his discharge and his death; that on February 20, [fol. 12] 1933, petitioner presented, through her attorney, the evidence and a brief of the law to the insurance Claims Council, Veterans Administration, at Washington, D. C.; and that said Council thereafter had the said claim under consideration.

Petitioner shows, however, that the defendant did, on the 29th day of March, decline and refuse to pay said claim. A copy of the letter denying said claim is hereto attached and made a part of this petition, marked Exhibit A.

13

That by reason of said denial of the claim, a disagreement has arisen under said contract of war risk insurance between petitioner and defendant.

14

That the provisions of the act of Congress of March 20, 1933, entitled, "An act to maintain the credit of the United States Government," specifically repealed all laws granting or pertaining to yearly renewable term insurance, except as to cases wherein contracts of yearly renewable term insurance have matured prior to March 20, 1933, and under which payments have been commenced or in which judgments have been rendered in a court of competent jurisdiction or any suit on a contract of yearly renewable term insurance or in which judgments may hereafter be rendered in any suit then pending.

That said act is retroactive and retrospective in its scope, is discriminatory and unreasonable, and violates Amendment V of the constitution of the United States of America, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

[fol. 13] 15

That the provisions of said Act of Congress of March 20, 1933, as follows:

"Title I, Sec. 1. That subject to such requirements and limitations as shall be contained in regulations to be issued by the President, and within the limits of appropriations made by Congress, the following classes of persons may be paid a pension," and in Section 3 thereof, "The President is authorized to prescribe by regulation the minimum degrees of disability and such higher degrees of disability as in his judgment should be recognized and prescribe the rate of pension payable for each such degree of disability," violate Article I, Sec. 1, of the Constitution of the United States of America, which provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and that said sections are, therefore, invalid and void.

16

That the provisions of the Act of Congress of March 20, 1933, as follows:

"Sec. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision," violate Article III, Sec. 1, of the Constitution of the United States of America, which provides: "The [fol. 14] judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," and further violates Amendment V of said Constitution, which

provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

17

That the provisions of said act of Congress of March 20, 1933, as follows:

Sec. 5. The Administrator of Veterans' Affairs is hereby authorized in carrying out the provisions of Title I of this act or any other pension act to delegate authority to render decisions to such person or persons as he may find necessary. Within the limitations of such delegations, and decisions rendered by such person or persons shall have the same force and effect as though rendered by the Administrator of Veterans' Affairs. The President shall personally approve all regulations issued under the provisions of this title," violate Article III, Sec. 1, of the Constitution of the United States, which provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," and further violates Amendment V of said Constitution, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

[fol. 15] 18

That the provisions of the Act of Congress of March 20, 1933, as follows:

"No person who is entitled to any benefits under this title shall participate in any determination or decision with respect to any claim to benefits under this title", violates Article IV, Sec. 2, of the constitution of the United States, which provides: "The citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states", and further violates the provisions of Amendment V of said constitution, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation", and further is discriminatory, unreasonable, and, therefore void.

Petitioner shows that she is entitled, as beneficiary under said policy, to a judgment against the United States of America for the said principal sum of $57,50 per month commencing August 1, 1919, for a total period of two hundred forty (240) months, the defendant being indebted to petitioner by reason of the foregoing facts.

Wherefore, petitioner prays that she do have and recover a judgment against the United States in said sum, and that she do have a jury trial of this case.

John J. McCreary, Attorney for Petitioner. Post Office Address: Macon, Georgia.

[fol. 16] EXHIBIT "A" TO COMPLAINT

Veterans' Administration, Washington

March 29, 1933.

Your File Reference: —.
In Reply Refer to FDBB
Lynch, Thomas S. XC 646 846.

Mr. John J. McCreary, Attorney at Law, Macon, Georgia.

DEAR SIR: The provisions of the act of March 20, 1933, entitled "An Act to Maintain the Credit of the United States Government", specifically repealed all laws granting or pertaining to yearly renewable term insurance except as to cases wherein contracts of yearly renewable term insurance have matured prior to March 20, 1933, and under which payments have been commences, or in which judgments have been rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance or in which judgments may hereafter be rendered in any such suit now pending.

Under these provisions favorable consideration of this claim for benefits under a contract of yearly renewable term insurance is barred and no further action in connection with this claim can be taken by the Veterans' Administration. Under these circumstances I regret to advise you that further inquiry of correspondence from you seeking further consideration of this claim will necessarily be of no avail.

The case folder is being retained in the Veterans' Administration at Washintgon, D. C.

Respectfully; H. E. McCoy, Director of Insurance.

Insurance Form 851.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT AND ORDER ALLOWING COMPLAINANT TO PROSECUTE ACTION WITHOUT PREPAYMENT OF COSTS

STATE OF GEORGIA,
County of Bibb:

Before me, an officer authorized by law to administer oaths, personally comes Mrs. Margaret Shea Lynch, the above named plaintiff, who, being duly sworn, on oath says that her counsel has advised her that she has a good cause of action in said case, and that from her poverty she is unable to pay the costs or give security therefor.

Mrs. Margaret Shea Lynch.

Sworn to and subscribed before me, this the 20 day of April, 1933. Margaret Haverfield, Notary Public, State at Large.

Order of Court

It is ordered that the Complainant in the above-entitled action be and she hereby is permitter to prosecute said action to conclusion without prepayment of fees or costs.

Bascom S. Deaver, United States Judge.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed April 21, 1933

Service of the within complaint is acknowledged; copy thereof received.

This 14th day of April, 1933.

W. A. Bootle, U. S. Attorney, Middle District of Georgia.

GEORGIA,
Bibb County:

I certify that I sent by registered mail (article #12329) from Macon, Georgia, to the Attorney General, Washington, D. C., a copy of the within complaint on April 14, 1933.
John J. McCreary, Attorney for Plaintiff.

[Filed endorsement omitted.]

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEMURRER—Filed May 8, 1933

Comes now the defendant, and before answering plaintiff's petition, demurs to the same upon the following grounds:

1

Defendant demurs generally to said petition upon the ground that the same sets out no cause of action against this defendant.

2

Defendant demurs generally to said petition upon the ground that the same is filed against the Sovereign, and shows upon its face that it is filed without consent of the Sovereign.

3

Defendant demurs generally to said petition upon the ground that the same is filed against the Sovereign, and shows upon its face that the Congress of the United States prior to the filing of this petition withdrew the consent of the Sovereign to be sued in such cases as the one attempted to be asserted by this petition.

4

Defendant demurs generally to both counts of said petition upon the ground that it appears upon the face on said petition that there exists no disagreement between the

plaintiff and the defendant, such as was required by the Former Acts of Congress permitting the Government to be sued, before such Acts were repealed.

[fol. 20]

5

Defendant demurs specially to Paragraphs Fifteen, Sixteen, Seventeen and Eighteen of Count One of said petition, and to Paragraphs Fifteen, Sixteen, Seventeen and Eighteen of the Second Count of said petition, upon the ground that the allegations contained in said Paragraphs are immaterial, irrelevant and surplusage.

6

Defendant demurs generally to the Second Count of said petition upon the ground that the same nowhere alleges facts sufficient to bring into play the provisions of Section 305 of the World War Veterans Act, for that said Count does not allege that the Veterans Administration had rated the insured as having a compensable disability.

7

Defendant demurs generally to Paragraphs Seven and Eight of the Second Count of said petition upon the ground that the allegations contained therein are immaterial, irrelevant and surplusage.

Wherefore, defendant prays that these grounds of demurrer be inquired into and sustained, and that said petition in its entirety be dismissed.

W. A. Bootle, United States Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 21] In United States District Court

[Title omitted]

Amendments to Complaint—Filed June 21, 1933

Comes now the above named plaintiff, who amends her complaint herein filed, as follows:

Count One

20

That the regulations issued pursuant to the act of Congress of March 20, 1933, entitled "An act to maintain the credit of the United States", include the following:

"V. Except as stated above no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims and claims hereafter filed for such benefits shall be disallowed."

That said regulation violates the provisions of Amendment V of the constitution of the United States, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation," and further is retroactive in its scope, is discriminatory and unreasonable, and therefore, void.

21

The said defendant is hereby notified to have and produce on each and every trial of this case all the documents in possession of defendant relating to service of the insured, all letters by or in behalf of the insured relating to his service and to said insurance and all affidavits and [fol. 22] other evidence submitted by or in behalf of petitioner in support of said claim for insurance, the same to be used by petitioner as evidence pertinent and material to her case.

Count Two

A

That petitioner made application to the defendant for an allowance of compensation by reason of the disability and death of the insured, and supported said application by proofs of said disability on the form of affidavits and requested payments of the same, but that the defendant never allowed said claim and never denied said claim on its merits, but that the same remained pending in the United States Veterans Bureau until March 20, 1933.

20

That the regulations issued pursuant to the act of Congress of March 20, 1933, entitled, "An act to maintain the credit of the United States", include the following:

"V. Except as stated above, no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims and claims hereafter filed for such benefits shall be disallowed."

That said regulation violates the provisions of Amendment V of the constitution of the United States, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation", and further is retroactive in its scope, is discriminatory and unreasonable, and therefore void.

[fol. 23] 21

That said defendant is hereby notified to have and produce on each and every trial of this case all documents in possession of defendant relating to service of the insured, all letters sent by or in behalf of the insured relating to his service and to said insurance and all affidavits and other evidence submitted by or in behalf of petitioner in support of said claim for insurance, the same to be used by petitioner as evidence pertinent and material to her case.

Wherefore, petitioner prays that said amendment be allowed by this court.

John J. McCreary, Attorney for Petitioner.

The foregoing amendment is allowed, subject to demurrer by the defendant.

This 21 day of June, 1933.

Bascom S. Deaver, U. S. Judge, District of Georgia.

[File endorsement omitted.]

[fol. 24] IN UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ALBANY DIVISION

At Law. No. 148

MRS. MARGARET SHEA LYNCH

vs.

UNITED STATES

ORDER SUSTAINING DEMURRER—Filed June 21, 1933

The above matter coming on to be heard on the demurrer of the defendant to plaintiff's petition, and plaintiff having amended her petition, and defendant having renewed its demurrer to the petition as amended, and after argument on said demurrer and consideration thereof;

It is hereby ordered that said demurrer be sustained and that plaintiff's petition as amended be dismissed.

This 21st day of June, 1933.

Bascom S. Deaver, United States Judge.

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 21, 1933

To the Honorable Bascom S. Deaver, Judge of the District Court of the United States for the Middle District of Georgia:

The petition of Mrs. Margaret Shea Lynch respectfully shows:

1

Petitioner is a citizen of the United States, residing within the Middle District of Georgia and is the above named plaintiff.

2

Petitioner filed suit against the United States of America under the laws of the United States and particularly arising under the World War Veterans Relief Laws on a con-

tract of United States War Risk Insurance issued to Thomas Stephen Lynch, late of Albany, Georgia, the son of petitioner, now deceased, and had said suit served on defendant as provided by law.

3

Said defendant interposed a general demurrer to said complaint and the issue of law came on for argument before Your Honor on the 1st day of June, 1933, pursuant to assignment.

[fol. 26] 4

Your petitioner tendered an amendment to her original complaint which amendment was allowed by the court, subject to demurrer.

5

The defendant thereupon renewed its demurrer to said petition as amended and the court thereupon sustained said demurrer and dismissed petitioner's complaint.

6

Petitioner shows that she desires to appeal from the judgment sustaining said defendan'ts general demurrer and dismissing petitioner's complaint to the Circuit Court of Appeals of the United States for the Fifth Circuit and that she verily believes that she is entitled to the redress she seeks in such appeal.

7

Petitioner shows that she has been advised by her counsel, John J. McCreary, Esquire, Macon, Georgia, that she has good ground for appeal.

8

Petitioner shows that her ground for appeal is that the judgment sustaining said demurrer was contrary to law for that the provisions of "an act to maintain the credit of the United States" quoted in said complaint were unconstitutional, null and void for the reasons specified in said complaint.

[fol. 27] 9

Petitioner shows that because of her poverty she is unable to pay the costs of said appeal or the costs for the printing of the record in the appellate court, or to give security for the same.

Petitioner presents this petition for appeal within three months of the date of the judgment appealed from.

Wherefore, petitioner prays an order of the Court allowing said appeal, to be prosecuted in forma pauperis.

And petitioner will ever pray.

This 18th day of July, 1933.

John J. McCreary, Attorney for Petitioner.

[fol. 28] In United States District Court

[Titled omitted]

Affidavit—Filed July 21, 1933

Georgia,
Bibb County:

Mrs. Margaret Shea Lynch, being duly sworn, deposes and says that she is a citizen of the United States of America; that she is plaintiff in the above captioned case, and is entitled to prosecute this appeal.

Deponent further states the fact to be that because of her poverty she is unable to pay the costs of said appeal or to give security for the same; that she believes she is entitled to the redress she seeks by such appeal, and that the nature of her cause of action is correctly and concisely set out in her petition filed in said case.

Deponent further states that this affidavit is made and filed for the purpose of availing herself of the rights and privileges provided by the act of Congress, chapter 209, approved July 20, A. D. 1892, and acts amendatory thereto.

Mrs. Margaret Shea Lynch.

Sworn to and subscribed before me this 8th day of July, 1933. Margaret Haverfield, Notary Public, State of Georgia at Large.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING APPEAL—Filed July 21, 1933

Mrs. Margaret Shea Lynch, the plaintiff in said case, desiring to appeal from the judgment of the court sustaining defendant's demurrer and dismissing said complaint, and having filed her petition for appeal and her assignment of errors, said appeal is allowed.

Said plaintiff having prayed to be allowed to appeal in forma pauperis, on her affidavit of poverty filed in accordance with the statute, it is ordered that she be allowed to prosecute her appeal to the Circuit Court of Appeals for the Fifth Circuit without making a deposit or executing a bond for costs, because of her poverty, as aforesaid, and it is ordered that all judicial officers who have occasion to perform services herein shall perform same as if the deposit for costs or security for costs had been given, as in such cases made and provided.

At Macon, within the Middle District of Georgia, this 21st day of July, 1933.

Bascom S. Deaver, U. S. District Judge.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS BY APPELLANT—Filed July 21, 1933

Mrs. Margaret Shea Lynch, plaintiff, as appellant respectfully tenders with her appeal to the Circuit Court of Appeals for the Fifth Circuit from the judgment of June 21st, 1933, sustaining defendant's demurrer and dismissing her petition, the following assignment of errors upon which she will rely in prosecuting said appeal:

1

That said act of March 20, 1933, entitled, "An act to maintain the credit of the United States government", repealing the laws granting or pertaining to yearly renewable term insurance and barring plaintiff's pre-existing rights,

is retroactive and retrospective in its scope, is discriminatory and unreasonable, and violates Amendment V of the constitution of the United States of America, which provides: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

[fol. 31]

2

That Title I, Sec. 1, of said act violates Article I, Sec. 1, of the constitution of the United States of America, which provides: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," and that said section is therefore, invalid and void.

3

That Title I, Sec. 5, of said act of March 20, 1933, violates Article III, Sec. 1, of the constitution of the United States of America, which provides: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish," and further violates Amendment V, quoted above.

4

That the provisions of said act of March 20, 1933, as follows: "No person who is entitled to any benefits under this title shall participate in any determination or decision with respect to any claim to benefits under this title," violates Article IV, Sec. 2, of the constitution of the United States, which provides: "The citizens of each State shall be entitled to all privileges and immunities of the citizens of the several states," and further violates the provisions of Amendment V, of said constitution, quoted above.

5

That the regulation issued pursuant to said act of March 20, 1933, as follows: "V. Except as stated above no payments will hereafter be made under contracts of yearly [fol. 32] renewable term insurance (including automatic insurance) and all pending claims and claims hereafter filed for such benefits shall be disallowed," violates the provi-

sions of Amendment V of the constitution of the United States of America as quoted above.

6

That the court erred in sustaining the defendant's demurrer to plaintiff's petition as amended and in dismissing the petition, and same was contrary to law.

Wherefore, plaintiff prays that the judgment of the said district court be reversed.

John J. McCreary, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 33] Citation in usual form, filed July 21, 1933, omitted in printing.

[fol. 34] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed July 21, 1933

To the Clerk of said Court:

You are requested to certify a transcript of record to be filed in the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Plaintiff's original petition.
2. Defendant's demurrer.
3. Plaintiff's amendment.
4. Judgment sustaining defendant's demurrer.
5. Plaintiff's Appeal.
6. Order allowing appeal.
7. Assignment of errors by appellant.
8. Citation.
9. Præcipe.

10. Agreement to præcipe.
11. Acknowledgment of service.

Respectfully, John J. McCreary, Attorney for Plaintiff (Appellant). Post Office: Macon, Georgia.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREEMENT TO PRÆCIPE—Filed July 21, 1933

We hereby agree that the foregoing praecipe is correct; that the records, documents, papers and proceedings therein set forth are sufficient for a complete record in this cause on appeal, and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript, and we hereby waive the issuance and service of notice upon any party hereto, and agree that said præcipe shall be obeyed by, and acted upon by, the clerk as fully and to all intents and purposes in the same manner as if said præcipe had been regularly filed and a true copy thereof served upon each party hereto.

A. Edward Smith, Asst. U. S. Attorney, Attorneys for Defendant (Appellee).

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed July 21, 1933

The above named defendant, as appellee, acknowledges service of the following portions of the record in the above stated case, by receiving duplicate copy thereof; and waives all other and further service:

1. The appeal of Mrs. Margaret Shea Lynch, plaintiff, as appellant.
2. The order allowing said appeal.
3. The assignment of errors by appellant.
4. The citation.
5. The præcipe.

A. Edward Smith, Asst. United States Attorney, Middle District of Georgia.

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] Minute entry of argument and submission, Oct. 10, 1933, omitted in printing.

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 7071

MARGARET SHEA LYNCH, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

In Forma Pauperis

Appeal from the District Court of the United States for the Middle District of Georgia

(November 3, 1933)

Before Bryan, Foster and Hutcheson, Circuit Judges

OPINION OF THE COURT—Filed November 3, 1933

FOSTER, Circuit Judge:

In April, 1933, appellant filed suit as beneficiary to recover on a policy of War Risk Insurance in the sum of $10,000. issued to her son while he was enlisted in the United States Navy. The material facts disclosed by the allegations of the petition are these. The policy was kept in force by the payment of premiums until September 1st, [fol. 40] 1919. No premiums were thereafter paid. The insured was totally and permanently disabled before September 1st, 1919, and the policy therefore matured. He died November 27, 1924. By reason of his total and permanent disability, the insured was entitled to compensation sufficient to pay the premiums on the policy until it matured by his death. No compensation was ever paid him. Appellant presented the claim for payment of the

insurance on February 20, 1933, which claim was denied on March 28, 1933, and a disagreement thereby arose.

The United States demurred to the complaint on the ground that the Court was without jurisdiction to entertain the suit because of the provisions of the Act of March 20, 1933, entitled An Act to Maintain the Credit of the United States Government. The demurrer was sustained. This appeal followed.

Section 7 of the Act of March 20, 1933, repeals all public laws granting compensation and disability allowances to veterans and all laws granting or pertaining to yearly renewable term insurance, with certain exceptions not material to this case, but in general terms vests in the Administrator of Veterans Affairs, under the general direction of the President, authority to review and pass upon such claims. Section 5 of the Act provides: "All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

Appellant contends that the policy of insurance sued upon is a contract in which she has a vested right; that the Act of March 20th, 1933, impairs the obligation of that [fol. 41] contract and deprives her of property without due process of law, in violation of the Fifth Amendment, and is therefore invalid; that under the Tucker Act, not repealed, the District Court had jurisdiction to entertain the suit as it was based on a breach of contract.

We need not discuss in detail the interesting questions raised by appellant. It is elementary that the United States may not be sued without her consent. Section 5 of the Act of March 20, 1933, is broad enough to deprive the District Court of jurisdiction whether vested by the provisions of the Tucker Act (28 U. S. C. A., § 41[20]) or under the provisions of the War Risk Insurance Act (38 U. S. C., § 445). Conceding that the policy of insurance is a contract it was subject to any provision of law subsequently enacted by Congress and appellant's constitutional rights were not impaired thereby. White vs. U. S., 270 U. S., 175.

Affirmed.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 7071

MARGARET SHEA LYNCH

versus

UNITED STATES OF AMERICA

JUDGMENT—November 3, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed November 23, 1933

May it please the Court:

Mrs. Margaret Shea Lynch, Appellant, comes at the same term of this court at which the judgment of the District Court was affirmed, within twenty-one days of the date of the decision affirming said judgment, and respectfully tenders this petition for a rehearing of said case, and a reversal of the judgment below.

Appellant reiterates the contentions made by her in her original and reply briefs on all of the points at issue, and says that the case of White v. United States, 270 U. S. 175, is neither applicable nor controlling for the reasons, first, that the amending statute construed in the White case was a curative act carrying out the intention of the insured, not a repealing act destroying and nullifying the property of the insured, and second, that older decisions of the Supreme Court, controlling on this court, uniformly hold that rights vesting under a statute cannot be abrogated under a repeal-

ing statute in violation of the Fifth Amendment to the Constitution of the United States.

[fol. 44] In spite of the foregoing, however, Appellant does not abandon the contentions urged in her reply brief, that the Fifth Amendment is self-executing and that to invoke the War Risk Insurance Act or the Tucker Act is unnecessary. For the purposes of this and similar cases the provisions of the Fifth Amendment must be deemed self-executing.

"The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.'

"Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself."

Davis v. Burke, 179 U. S. 399, 403.

Appellant respectfully shows to the Court that other suits on War Risk Insurance [illegible] certificates have been brought in district courts of other states attacking the constitutionality of "an act to maintain the credit of the United States Government", but that such cases, so far as she knows or believes, have been determined without the necessity of passing upon the constitutional questions.

[fol. 45] The facts of the case at bar are undisputed, counsel for Appellee having adopted the statement of facts recited by Appellant in her original brief, and in order that the constitutional points may be considered at an early date by the Supreme Court of the United States, Appellant respectfully prays that this Court certify the question to the Supreme Court for an answer binding all concerned.

And Appellant will ever pray.

Respectfully submitted, John J. McCreary, Attorney for Appellant. Post Office: Macon, Georgia.

GEORGIA,
Bibb County:

I, John J. McCreary, of counsel for the Appellant herein, having carefully examined the opinion of the Honorable Court, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

This 20th day of November, 1933.

John J. McCreary, Counsel for Appellant.

Georgia,
Bibb County:

Service of the foregoing petition is acknowledged; copy received. All other and further service or notice waived.

This 21st day of November, 1933.

——— ———, U. S. Attorney, Counsel for Appellee.

Copy.

[fol. 46] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—December 14, 1933

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 47] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 48] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 9, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAR 12 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROWLAND W. FIXEL,
ARTHUR E. FIXEL,
JOHN J. MCCREARY,
M. FROOME BARBOUR,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari:	
Summary statement of the matter involved	1
Constitutional violations alleged	2
Respondent's express defenses outlined	3
Reasons relied on for allowance of writ	4
Statement of questions involved	5
Prayer for writ of certiorari	6
Verification by counsel	7
Brief in support of petition:	
The facts	9
Reference to official report	10
Statement of the grounds on which jurisdiction is invoked	10
Specification of errors assigned	11
Summary of argument	11
Argument and citations	12

Table of Citations.

Statutes: Public No. 2, 68 U. S. C. A. 701, et seq.	5, 10, 11
Constitutional provisions: Amendment V	12, 14

Table of Citations—Decisions.

Bank of Columbia v. Okeley, 4 Wheat. 235	16, 24
Barcham v. Rochester, 220 N. Y. Sup. 566, 63	36
Brice v. McDow, 116 S. C. 324, 108 S. E. 84	36
Calder v. Bull, 3 Dall. 386, 388, 1 L. Ed. 648	14, 27
Columbia Bank v. Okeley, 4 Wheat. 235	16, 24
Central Pac. R. R. v. Gallatin, 99 U. S. 700, 702	22
Commonwealth v. Essex Co., 13 Gray 239	16
Commonwealth v. Bridge Proprietors, 2 Gray 339	17
Chase v. U. S., 222 Fed. 593	18
Chick Spr. Water Co. v. State Highway Dept., 139 S. C. 481, 137 S. E. 842 (3, 9)	36
Chambers v. Cincinnati & Ga. R. R., 69 Ga. 320	36
Dartmouth College v. Woodward, 4 Wheat. 518	24, 27
Davis v. Burke, 179 U. S. 399, 403	35
Detroit v. Oakland Circuit Judge, 237 Mich. 446	36
Forsyth v. Hammond, 166 U. S. 506	10
Gunn v. Barry, 82 U. S. 610	13, 26
Hoyt Metal Co. v. Atwood, 289 Fed. 453, 454	13
Highland v. Russell Car & Snow Plow Co., 279 U. S. 260	14
Holyoke v. Lyman, 15 Wall. 500, 523	17, 18

	Page
Householder v. Kansas City, 83 Mo. 488	36
Hurtado v. California, 110 U. S. 516	16
Jensen v. U. S., 29 Fed. (2d) 952	20
Johnson v. Parkersburg, 46 W. Va. 402	36
Lamb v. Powder River Live Stock Co., 132 Fed. 1349	12
Loan Association v. Topeka, 20 Wall. 655	14, 26
Legal Tender Cases, 79 U. S. 457	27
Hockett v. State Board, 91 Ohio 176	
Miller v. State, 15 Wall. 478, 499	17
Marbury v. Madison, 1 Cranch 137, 163	26
McElroy v. Kansas City, 21 Fed. 257 (1)	36
Norris v. Tripp, 111 Iowa 115	12
Pinkum v. City of Eau Claire, 81 Wis. 301	13
Pac. Ry. Com., In re, 32 Fed. 241, 260-1	20, 28
Rowan v. State, 30 Wis. 129	15, 25
Ruling Case Law, 6-144, 145	15, 25
6-137	21
6-58, Sec. 53	36
Randall v. Krieger, 90 U. S. 137, 148-9	16
Rose's Notes, 25 L. Ed. 768	22
St. Louis, K. C. & C. R. Co. v. Wabash P. Co., 217 U. S. 217	10
Sinking Fund Cases, 99 U. S. 700	13, 25
Sturges v. Crowninshield, 4 Wheat. 122, 206	13, 26
Shields v. Ohio, 95 U. S. 319, 324	16
State v. Kyle (Missouri), 166 Mo. 287	36
State v. Ross (Louisiana), 114 La. 898	36
State v. Hall (North Dakota), 44 N. D. 459	36
Stevens v. Benson, 50 Oregon 260	36
Tufts v. Tufts, 8 Utah 142	13
Thorne v. Clarksburg, 88 W. Va. 25	36
Union Pac. R. R. Co. v. U. S., 99 U. S. 700, 720	13, 15, 17, 25, 27, 28
U. S. v. Lee, 106 U. S. 196	27
Von Hoffman v. Quincy, 4 Wall. 535	13
Woods, In re, 143 U. S. 202	10
White v. U. S., 270 U. S. 175	4, 5, 10, 12, 16
Walker v. Whitehead, 16 Wall. 314	43
Winchester v. Howard, 136 Calif. 432	36
Willis v. St. Paul Sanitation Co., 48 Minn. 140	36

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH,
Petitioner (Appellant below),

vs.

THE UNITED STATES OF AMERICA,
Respondent (Appellee below).

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States: Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Mrs. Margaret Shea Lynch, a citizen of the United States, respectfully shows:

I.

Summary Statement of the Matter Involved:

Petitioner's suit was brought against the United States of America under the laws of the United States, and particularly under the Adjusted World War Veterans Act, on a $10,000.00 contract of War Risk Insurance issued by the United States of America to Thomas S. Lynch, a son of

petitioner. It was alleged by petitioner in said suit that the insured died in 1924 of a disease which had rendered him totally and permanently disabled during the life of the policy. Her claim for said insurance had been duly filed and held for consideration until March 29, 1933, at which time petitioner was informed that no further consideration would be given said claim by the respondent.

The only reason given petitioner by the Veterans Administration why payment was declined was that by "An Act to Maintain the Credit of the United States Government," approved March 20, 1933, being Public Act No. 2 of the 73rd Congress, all laws granting or pertaining to yearly renewable term insurance (with certain exceptions not material to this case) had been repealed. That during all these years the claim, with supporting proofs, called for and supplied from time to time, had been pending before the Veterans Administration.

Petitioner filed suit in April, 1933, alleging in addition to the material averments of her claim that the said Public Act No. 2 of the 73rd Congress, being the Act of March 20, 1933, entitled, "An Act to Maintain the Credit of the United States Government," violated the following provisions of the Constitution of the United States:

a. Amendment V, providing: "No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." (The regulation adopted pursuant to said act, discontinuing payments of term insurance, was attacked on the same ground.)

b. Art. I, Sec. 1, providing: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

c. Art. III, Sec. 1, providing "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

d. Art. IV, Sec. 2, providing "The citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States."

The defendant's [illegible] general demurrer raised only the following express issues:

a. That the suit was filed against the Sovereign, and showed on its face that it was filed without the consent of the Sovereign.

b. That the suit showed that prior to its filing Congress had withdrawn the Sovereign's consent to be sued.

c. That the suit showed that there exists no disagreement between plaintiff and defendant, such as was required by the former acts permitting the Government to be sued before repeal of said former acts.

By separate paragraphs, defendant demurred specially to all allegations that the Economy Act violated the Constitution (except as to the Fifth Amendment) on the ground that they were "immaterial, irrelevant and surplusage."

The District Court sustained the Government's demurrer and dismissed the case, whereupon petitioner appealed to the Circuit Court of Appeals, First Circuit, which affirmed the District Court on the one ground that Section 17 of the Act of March 20, 1933, repealing said term insurance laws and thereby withdrawing the Government's consent to be sued, is broad enough to deprive the District Court of jurisdiction whether vested by the provisions of the Tucker Act or the War Risk Insurance Act. The single case of

White v. *U. S.*, 270 U. S. 175, holding that the insurance contract was subject to any provision of law subsequently enacted without impairing the beneficiary's constitutional rights, was cited.

By a timely petition for a rehearing, petitioner prayed said Circuit Court of Appeals to distinguish the legal effect of a repealing act from that of an amending act, and also to declare that the Fifth Amendment is self-executing and needs neither the Tucker Act nor the War Risk Insurance Act to aid the carrying out of its provisions. The Circuit Court of Appeals denied this petition on December 14, 1933 (see 67 Fed. (2d) 490), and petitioner applies for this writ of certiorari within three months of said date.

II.

Reasons Relied on For the Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals in holding that Congress had the power to repeal all laws granting or pertaining to said war risk insurance (with certain exceptions not applicable to this case), and thereby terminate all rights, benefits and remedies under the insurance policy on which suit was herein brought, is an erroneous decision of an important question involving upwards of twenty thousand (20,000) other policy-holders similarly situated.

B.

The decision of the Circuit Court of Appeals in holding that the United States by reason of its sovereign character, could withdraw its consent to be used on said war risk insurance contract, involves an important question of Federal law which has not been, but should be, settled by this Court.

C.

The decision of the Circuit Court of Appeals in holding the legal principle announced in *White v. United States*, 270 U. S. 175, to be applicable to the facts of this case, is an erroneous decision, in conflict with the principle announced by the Supreme Court in said case.

D.

The decision of the Circuit Court of Appeals in holding in effect that the power to amend the War Risk Insurance Act, with reference to the said contract of insurance, included the power to repeal said act, so as to terminate rights under said insurance contract, which were at the time of the repealing act in full force and effect, and thereby cancel the United States contracts of insurance, including the one sued on in the case at bar, is a decision of a Federal question in conflict with applicable decisions of this Court.

E.

The decision of the Circuit Court of Appeals in holding that the District Court had no jurisdiction to entertain the suit under the Tucker Act or the War Risk Insurance Act, or under the self-executing character of the Fifth Amendment of the Constitution of the United States, involves an important question of Federal law which has not been, but should be, settled by this Court.

III.

The questions involved are:

1. Whether Sec. 17 of Public Act No. 2, of the 73rd Congress, being "An Act to Maintain the Credit of the United States Government," approved March 20, 1933, repealing all laws granting or pertaining to yearly renewable term

insurance, is "an amendment" to the War Risk Insurance Act of October 6, 1917, Chap. 105, Art. IV, Sec. 400, Stat. at L. 398, 409, Comp. Stat. 514u, and if so, is said Act in contravention of the Fifth Amendment of the Constitution of the United States?

2. Whether Amendment V of the Constitution of the United States requires the Tucker Act, the War Risk Insurance Act, or any other Act, to authorize suits against the United States on war risk insurance policies, or is said Amendment V self-executing in its character as to such suits?

The specific questions raised by petitioner's assignments of error are not here repeated, reference being made to the record.

IV.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 7071, Margaret Shea Lynch, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes

of the United States, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit of December 14, 1933, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

This February 24th, 1934.

ROWLAND W. FIXEL,
ARTHUR E. FIXEL,
Detroit, Mich.,
JOHN J. McCREARY,
Macon, Ga.,
M. FROOME BARBOUR,
Cincinnati, Ohio,
Counsel for Petitioner.

STATE OF GEORGIA,
County of Bibb:

Before me, an officer authorized by law to administer oaths, personally appears John J. McCreary, who, being first duly sworn, deposes and says that he is of counsel for Mrs. Margaret Shea Lynch, the petitioner, that he has had charge of this case in all the courts, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

JOHN J. McCREARY.

Sworn to and subscribed before me this 24th day of February, 1934.

W. C. T———
Notary Public, Bibb County, Georgia.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH,
Petitioner (Appellant Below);

vs.

THE UNITED STATES OF AMERICA,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Facts.

1. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, being Title 28, Section 347 (a) of the United States Code Annotated.

2. On November 3, 1933, the Circuit Court of Appeals for the Fifth Circuit affirmed a judgment of the District Court of the United States, for the Middle District of Georgia, sustaining a demurrer to plaintiff's declaration, and on December 14, 1933, denied a petition for rehearing in said cause.

3. The claims advanced by petitioner in the Circuit Court of Appeals were:

(a) That Section 17 of Public Act No. 2, 73rd Congress (38 U. S. C. A. Sec. 701, *et seq.*) is void and unconstitu-

tional in that it impairs the obligation of the contract upon which petitioner sued, deprives her of property without due process of law, and takes private property for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

(b) That the Fifth Amendment to the Constitution is self-executing and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions. These contentions were overruled by the lower court. See pages 24 and 25 of the record.

4. Official report of the opinion delivered in the court below is found in 67 Fed. (2d) 490.

5. Petitioner's action was based on a war risk insurance policy. The United States demurred to the complaint on the ground that the court was without jurisdiction to entertain the suit because of the provisions of the Act of March 20, 1933 (38 U. S. C. A. Sec. 701, *et seq.*). The demurrer was sustained and the said act was held to be constitutional. This ruling was based on *White* v. *U. S.*, 270 U. S. 175, 46 S. Ct. 274, 70 L. Ed. 530. Petitioner believes that said ruling was erroneously based on said Supreme Court decision, and as the case is of general importance, in that its decision directly affects about 20,000 other similar claims, it is necessary in the public interest that the question of the constitutionality of said act of Congress be determined.

6. Cases believed to sustain said jurisdiction are the following:

In re Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125.

Forsyth v. *Hammond*, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

St. Louis, K. C. & C. R. Co. v. *Wabash P. Co.*, 30 S. Ct. 510, 217 U. S. 247, 54 L. Ed. 752.

7. It is urged that the rejection of plaintiff's claim was wrongful in that said rejection was based on a law which plaintiff alleges to be unconstitutional and in violation of the Fifth Amendment to the Constitution.

8. A specification of errors intended to be urged in said petition are as follows:

(a) That the court erred in holding that said contract of war risk insurance was subject to any provision of law subsequently enacted by Congress.

(b) That said court erred in holding that petitioner's constitutional rights were not impaired.

(c) That said court erred in holding Public Act No. 2 of the 73rd Congress (38 U. S. C. A. Sec. 701, *et seq.*) constitutional and valid and not being in contravention of the Fifth Amendment to the Constitution of the United States, insofar as it repealed all laws granting or pertaining to yearly renewable term insurance (excluding such exceptions as are not material to this case).

(d) That said court erred in holding that the United States may not be sued without her consent, under Amendment V to the Constitution of the United States, said amendment being self-executing in its character as to such suits.

II. Summary of Argument.

1. The contract of insurance involved in this case and the right of action therein is property within the meaning of the Fifth Amendment.

2. Congress has no power to interfere with contracts except where such power is expressly given to it.

3. Rights under war risk insurance may not be cancelled without due process of law.

4. The power to amend a law authorizing a contract between the United States and an individual does not include a power to repeal the law, so as to destroy a vested right already in existence thereunder.

5. The United States in providing for war risk insurance, and granting its consent to be sued, did not act in its sovereign capacity. It was but a party to a contract. Hence it cannot withdraw rights vested under such contract.

6. Congress has no right or power to impair the obligation of the contract of decedent.

7. Congress may not directly impair the obligation of United States contracts, under the claim that it is acting to maintain the credit of the United States.

8. The Fifth Amendment to the Constitution is self-executing and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions.

III. ARGUMENT.

1. The contract of insurance involved in this case and the right of action therein is property within the meaning of the Fifth Amendment.

In *White* v. *United States*, 270 U. S. 175, 180, 70 L. Ed. 530, it was held that war risk insurance is a contract. The soldier takes it or leaves it alone; if he takes it, he pays for it, and his benefit is proportional to his payment.

In *Lamb* v. *Powder River Live Stock Company*, 132 Fed. 434-9, it was held that a right of action, which springs from a contract is property within the protection of the Fifth Amendment to the United States Constitution.

That an accrued right of action is a vested property right is well settled.

Norris v. *Tripp*, 111 Iowa 115, 82 N. W. 610.

142, 16 L. R. A. 482, 30 Pac. 309.

301, 51 N. W.

289 Fed. 454 (C. C. A. 7) 59

material part of the

4 Wall. 535.

16 Wall. 314.

15 Wall. 610.

and both are

16 Wall. 314.

2. Congress has no power to interfere with contracts except where such power is expressly given to it.

page 356.

what has already been done and

contracts that have already been made,

for what shall be done in the future and

what preparation shall be made for the due per-

formance of contracts already entered into.

99 U. S. 720, 25 L. Ed.

The United States cannot interfere with private rights,

for illegitimate governmental purposes, nor can the

Federal Government deprive any person of property with-

out due process of law.

289 U. S. 709, 25 L. Ed. 496.9

Justice Marshall in *Trustees v. Cruttenden*, 4 Wheat.,

200, in discussing the purpose of the Convention which

framed the Constitution in regard to the protection of private contracts, said that the Convention intended to establish a great principle, "*that contracts should be inviolable.*"

Property vested in contracts is like all other property, protected against invasion by the legislature, whether State or National.

Loan Association v. *Topeka*, 20 Wall. 655, 22 L. Ed. 455.

3. Rights under war risk insurance may not be cancelled without due process of law.

Cooley in Const. Limitations, on page 175, says:

> "The bill of rights in the American Constitution forbids that parties shall be deprived of property except by law of the land; but if it had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void."

In *Calder* v. *Bull*, 3 Dall. 388, speaking of the powers of legislatures, the court said:

> "They command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the right of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or State legislatures possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.
>
> "A law that destroys or impairs the lawful, private contracts of citizens is against all reason and justice and, therefore, no law."

Justice Butler, in *Highland* v. *Russell Car and Snow Plow Co.*, 279 U. S. 260, 73 L. Ed. 691, said:

"It is everywhere recognized that the freedom of the people to enter into and carry out contracts, in respect to their property and private affairs, is a matter of great public concern and that such liberty may not lightly be impaired. * * * Generally speaking, that right is protected by the due process clauses of the 5th and 14th Amendments."

Where rights are acquired by a citizen under the existing law, there is no power in any branch of the Government to take them away except by due process of law.

6 R. C. L. 444.

Rowan v. State, 30 Wis. 129, 11 Am. Rep. 559.

The purpose of this clause is to exclude arbitrary power from every branch of the Government. Hence it is a restraint on the legislative, the executive and judicial departments.

6 R. C. L. 445.

The limitations imposed by the requirements as to due process of law are limits equally on the United States.

Union Pacific R. R. Co. v. United States, 99 U. S. 700, 25 L. Ed. 496.

The principle of due process of law had its origin in England as a protection of individuals from arbitrary action on the part of the crown. It has been said that in this country the requirement is intended to have a similar effect against legislative power; that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or *his property*. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. The primary purpose of this guaranty was the protection of the individual from the arbitrary exercise of the powers of government, unrestrained by the

established principles of private rights and distributive justice.

Bank of Columbia v. *Okely*, 4 Wheat 235.
Hurtado v. *California*, 110 U. S. 516, 28 L. Ed. 232.

4. The power to amend cannot be extended so as to destroy a vested right.

In the lower Court the case of *White* v. *U. S.*, 270 U. S. 175, was relied upon as a basis for the court's decision that Congress could nullify war risk insurance contracts under which rights had become vested.

All that *White* v. *U. S.* decided was that Congress had power to amend the war risk act to make the wish of the insured effective. The amendment in effect was a curative act, removing a technicality, so that the expressed will of the soldier in the written contract might be effective. This sort of act is legal and binding.

Randall v. *Kreiger*, 90 U. S. 137, 148-9.

But to hold as the lower Court did that by amendment, the Congress had the right to annul the contract or repudiate it or destroy all rights contracted to be given thereby, is altogether unsound, and without precedent.

In *Shields* v. *Ohio*, 95 U. S. 324, 24 L. Ed. 357-9, it was said:

> "'The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be in good faith; and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be afflicted under the guise of amendment or alteration.''

In *The Commonwealth* v. *Essex Company*, 13 Gray 239, it was held that where the reserved right of amendment was unlimited and where, under power in a charter, rights

have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.

Commonwealth v. *Bridge Proprietors*, 2 Gray 339.
Miller v. *State*, 21 L. Ed. 104.
Holyoke v. *Lyman*, 21 L. Ed. 140.

In *Hyatt* v. *McMann*, 25 Barb. 467, it was said:

> "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, which by legitimate use of the powers granted, have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of stockholders and creditors, and for the proper disposition of the assets."

In *Union Pacific* v. *United States*, 99 U. S. 720, 25 L. Ed. 501, it was held that the United States cannot, any more than a State, interfere with private rights except for legitimate governmental purposes. It was said that while the United States is not included within the constitutional prohibition which prevents states from passing laws impairing the obligation of contracts, yet equally with the states, they are prohibited from depriving persons or corporations of property without due process of law, and although Congress has reserved the right of amendment, it cannot undo what has already been done; and it cannot remake contracts that already have been made; but it may provide for what shall be done in the future and may direct what preparation shall be made for the due performance of contracts already entered into.

In *Holyoke Water Power Company* v. *Lyman*, 82 U. S. 507, 21 L. Ed. 104, a charter was subject to alteration, repeal or amendment. It was held:

> "Power to legislate founded upon such a reservation is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in the charter granted, subject to it, that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public rights not expressly granted away by the charter."

No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed.

Chase v. *U. S.*, 222 F. 593, 138 C. C. A. 117, C. C. A. 8 C.

From the foregoing, it clearly appears that although the right of amendment was reserved by Congress, such right of amendment cannot be exercised to deprive the party contracting with the Government of a vested right, nor can such right of amendment be exercised to defeat or substantially impair the object of the grant.

In the case at bar it appears that Congress has completely nullified the contract. The authority to do so is nowhere found in the law authorizing the contract. Power to amend clearly cannot mean power to destroy, and since Congress has seen fit to attempt to exercise a power not granted, and has likewise not only substantially impaired the object of the contract, but has completely defeated the right and the remedy by repealing the entire law under which the right and remedy were given, it must be held that such action is without any basis, either in the original

War Risk Insurance Act or in any other power given to Congress in connection with this class of legislation.

Section 17 of Public Act No. 2 of the 73rd Congress must therefore be held to be void, insofar as it repeals the original War Risk Insurance Act, as the power to amend does not include the power to repeal.

5. The United States, in providing for war risk insurance and granting its consent to be sued, did not act in its sovereign capacity. It was a mere party to a contract. Hence it cannot withdraw rights vested under said contract.

We agree that a sovereign cannot be sued in its own courts or in any other without its consent.

The fallacy of applying this doctrine to the case at bar is apparent, when it is seen that in the sale of yearly renewable war term insurance, the United States did not act in its sovereign capacity, but in effect established a relation of debtor and creditor. Furthermore, it gave its consent to be sued and provided for the payment of judgments rendered.

For a consideration, namely the monthly premium payments, the United States undertook to insure against death and total and permanent disability, such members of the military and naval forces who agreed to purchase and pay for insurance policies from $1000 to $10,000, in multiples of $500 each.

There were covenants in the policies, on the part of the Government, under which it undertook a liability, upon the happening of future events; and there was an undertaking or an agreement on the part of the soldier to pay the premiums provided for.

The Government and the soldier stood upon an equal footing as contractors, and upon the same footing, as debtor

and creditor, as if the contract or obligation existed between two natural persons. The relation of debtor and creditor arising under this contract is but a private relation. *It is not a sovereign or governmental relation.*

As was said in *Jensen* v. *United States,* 29 Fed. (2nd) 952,

> "It is suggested that since war risk insurance differs from commercial life insurance, in that it is an insurance against both death and total disability, and may be reinstated at a time when the insured is suffering from service connected temporary total disability, the rule applicable to commercial insurance is not controlling, in the constructions of section 307 of the World War Veterans' Act. But war risk insurance is not a gratuity but a contract between the insured and the government, and the rights of the parties are to be ascertained from the terms of their contract. *St. Bank & Trust Co.* v. *U. S.* (C. C. A.), 16 F. (2d) 439, The provisions of section 307, are, I take it, to be construed and determined by the applicable rules to similar provisions in any other contract of insurance."

In other words, the Government, in embarking in the insurance business, entered into a strictly contractual relationship, separate and apart from its sovereign character. And having done so, cannot claim the right to withdraw authority to sue on the contract entered into on the ground that it is a sovereign, any more than an individual would have such right.

The distinction between a sovereign's and a strictly contractual relationship, or the two-fold character in which the United States may act, is clearly pointed out in *In re Pacific Ry. Com'n,* 32 Fed. 260-1.

> "• • • The United States, in sections 5 and 6 of the act of 1862, and section 5 of the Act of 1864, tendered the railroad companies a contract, and, when

accepted, there was a contract between the parties upon the terms specified, obligatory upon both, and which could not be changed by either, without the consent of the other. Says the Supreme Court in *U. S.* v. *Railroad Co.*, 118 U. S. 238, 6 Sup. Ct. Rep. 1038, after quoting these provisions: 'These sections, taken together, constitute the contract between the United States and the appellee. *U. S.* v. *Railroad Co.*, 91 U. S. 72; *Sinking Fund Cases*, 99 U. S. 700-718; *Railroad Co.* v. *U. S.* 104 U. S. 662. This contract is binding on the United States, and they cannot, without the consent of the company, change its terms by any subsequent legislation. *Sinking Fund Cases, supra.*'

* * * * * * *

"The relation of the Central Pacific Railroad Company to the United States, therefore, under the contract, as a contract, is now, simply, that of debtor and creditor, with certain covenants for services on its completed road, still to be performed by the latter, with the debt, and performance of those covenants secured by certain specific liens upon portions of the property of the debtor. They stand upon an equal footing as contractors, and upon the same footing, as debtor and creditor, as if the indebtedness, obligations, and securities existed between two natural persons. This is, clearly, the result, as established by the Supreme Court in the Sinking Fund Cases, which has, by a divided court, extended the power of Congress further in that direction than any other case, and as it seems to us, to the utmost admissible limit. In those cases the chief justice, who announced the opinion of the majority of the court, in speaking of the Union Pacific Company, which is a corporation created by Congress itself, said:

'The United States occupy towards this corporation a twofold relation—that of sovereign, and that of creditor. *U. S.* v. *Railroad Co.*, 98 U. S. 569. Their rights as a sovereign are not crippled because they

are creditors, and their privileges as creditors are not enlarged by the charter because of their sovereignty. They cannot, as creditors, demand payment of what is due them before the time limited by the contract. Neither can they, as sovereign, or creditors, require the company to pay the other debts it owes, before they mature.' 99 U. S. 724.

* * * * * * *

"* * * *The relation of debtor and creditor arising under a contract is but a private relation. It is not a sovereign, or governmental, relation. And the power reserved in the acts of Congress to repeal, or amend the act as to the Central Pacific Railroad Company could, only, extend to amendment, so far as it operated as a law, and not as a contract, and, then, not to affect the terms of the contract after it had become executed, and rights had vested under it.*"

The same rule was announced by Mr. Justice Strong in *Central Pacific R. R. Co.* v. *Gallatin*, 99 U. S. 732, 25 L. Ed. 506:

"It is as much beyond the power of a legislature under any pretense, to alter a contract into which the government has entered, with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. *As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors.*"

In Rose's Notes (Annotations 25 L. Ed. page 768) it is said:

"United States are as much bound by their contracts as are individuals."

While we do not challenge the rule that a state cannot be sued without its consent, we maintain,

(a) that if the State contracts in any other than its sovereign capacity and grants its consent to be sued, it cannot thereafter withdraw such consent, if rights have vested prior to the withdrawal.

(b) that if the withdrawal of the consent to be sued directly impairs the obligation of a contract, such withdrawal cannot be effected to divest vested rights.

In the case at bar, the plaintiff's son and defendant entered into a contract, wherein each contracted in an individual capacity. The United States agreed to insure plaintiff's son and plaintiff's son in consideration thereof agreed to pay monthly premiums for the protection. The writing of insurance was a non-governmental function. It was in no way incident to the exercise of sovereign powers. It was not compulsory; it was optional. And while it provided a cheap form of policy to the soldier, it was in no way different from a contract of insurance written by any life or accident insurance company. Under these conditions, the United States cannot claim immunity from suit by withdrawing behind the cloak of its sovereignty. Such a claim could be sanctioned only where it had contracted in its sovereign capacity.

To quote again from *In re Pacific Ry. Com'n.*, 32 Fed. 261:

> "* * * The relation of debtor and creditor arising under a contract is but a private relation. It is not a sovereign, or governmental relation. And the power reserved in the acts of Congress to repeal, or amend the act as to the Central Pacific Railroad Company could, only, extend to amendment, so far as it operated as a law, and not as a contract, and, then, not to affect the terms of the contract after it had become executed, and rights had vested under it."

6. Congress has no right to impair the obligation of the contract of plaintiff's intestate.

Article V of the United States Constitution prohibits the Federal Government from depriving any person of "*property without due process of law.*"

> "The principle that no person should be deprived of life, liberty or property exeept by due process of law did not originate in the American system of constitutional law, but was contained in Magna Charta as a part of ancient English liberties * * * It has even been said that the principle was known before Magna Charta (1215) and that it was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law."
>
> 6 R. C. L. 437:

In *Columbia Bank* v. *Okely*, 4 Wheat. 244, 4 L. Ed. 559, the Court said:

> "As to the words from Magna Charta, (due process of law) incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this; that arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Mr. Webster, in his argument in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629, said:

> "By the law of the land, is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and enters judgment only after a trial. The meaning is, that every citizen shall hold his life, liberty and property and immunities under the protection of the general rules which govern

society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, the acts of attainder, Bills of pains and penalties, Acts of confiscation, Acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures of all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance inoperative and void. It would tend directly to establish the Union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under."

Where rights are acquired by a citizen under the existing law, there is no power in any branch of the Government to take them away except by due process of law.

6 R. C. L. 444

Rowan v. *State*, 30 Wis. 129, 11 Am. Rep. 559.

The purpose of this clause is to exclude arbitrary power from every branch of the Government. Hence it is a restraint on the legislative, the executive and judicial departments.

6 R. C. L. 445.

The limitations inherent in the requirements as to due process of law are binding equally on the United States.

Union Pac. R. Co. v. *United States*, 90 U. S. 700, 25 L. Ed. 496.

And it is recognized that the United States cannot interfere with private rights, except for legitimate governmental purposes, nor can the Federal Government deprive any person of property without due process of law.

Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496.

In *Sturgis* v. *Crowninshield,* 4 Wheat. 206, Chief Justice Marshall, in discussing the purpose of the Convention which framed the Federal Constitution in regard to the protection of private contracts, said:

> "To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be affected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that *contracts should be inviolable.*"

In *Loan Ass'n.* v. *Topeka,* 20 Wall. 655, 22 L. Ed. 455, it was held that property vested in contracts is, like all other property, protected against invasion by the legislature, whether state or national.

In *Marbury* v. *Madison,* 1 Cranch 163, Chief Justice Marshall said:

> "The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appelation if the laws furnish no remedy for the violation of vested rights."

In *Gunn* v. *Barry,* 82 U. S. 622, 21 L. Ed. 212, 15 Wall. 610, it was said:

> "To take away, therefore, the legal remedy of contracts thus entered into, is to destroy a material portion of the consideration which induced their execution.
>
> "The right to enforce the contract by legal process enters into the contract itself, and when that right is taken away, its obligation is impaired."

Daniel Webster in a speech in the Senate of the United States on July 11, 1832, on the President's veto of the United States Bank Bill, said:

"Any Congress may repeal the act or law of its predecessor, if in its nature it be repealable, just as it may repeal its own act, and if a law or an act is unrepealable in its nature, it can no more be repealed by a subsequent Congress than by that which passed it. All this is familiar to everybody. And Congress, like every other legislature, often passes acts which, being in the nature of grants or contracts, are irrepealable ever afterwards * * *. Every legislature binds itself, whenever it makes a grant, enters into a contract, bestows an office, or does any other act or thing which is in its nature irrepealable * * *."

Congress is, as such, prohibited from passing laws impairing the obligation of contracts, as are the legislatures of the states.

Union P. R. Co. v. *U. S.*, 99 U. S. 718, 25 L. Ed. 501.
Calder v. *Bull*, 3 Dall. 388, 1 L. Ed. 649.
U. S. v. *Lee*, 106 U. S. 196, 27 L. Ed. 171.
Dartmouth College v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629.

In the case at bar, section 17 of Public Act No. 2 directly voids plaintiff's contract. Consequently, if Public Act No. 2 is held to be constitutional, plaintiff's contract is directly, not indirectly, affected. He is being deprived of property without due process of law, contrary to the Fifth Amendment. As stated by Mr. Justice Strong, in the Legal Tender Cases, the Fifth Amendment "has always been understood as referring to a direct appropriation and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or inhibit laws which indirectly work harm and loss to individuals."

That is the reason why the Supreme Court upheld the Legal Tender Act, namely, because the act did not make a

direct appropriation of anyone's property, and any injuries that resulted from its operation were consequential. In the case at bar, Public Act No. 2 operates directly to destroy plaintiff's contract by express words, and takes plaintiff's property without due process of law.

An analogous situation is found in *Union Pacific R. R. Company* v. *United States,* 99 U. S. 720, 25 L. Ed. 501. In that case, the question was whether the Union Pacific Railroad Company was deprived of its property without due process of law by reason of Congress passing an Act in 1878 requiring the Union Pacific Railroad Company to establish a sinking fund, for the repayment of a loan to the United States which had been granted under a previous act of Congress.

Mr. Chief Justice Waite, who delivered the opinion of the Court, while upholding the validity of the legislation on the theory that no property was being taken from the railroad company by requiring it to create the sinking fund, said:

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this Corporation to aid in the construction of its railroad. Neither can they by legislation compel the Corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong

and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

And, even though the original Act of Congress under which the contract with the Union Pacific Railroad Company was made, provided that Congress might at any time alter, amend, or repeal the Act, Chief Justice Waite makes it very clear that such a power has its limits and cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession. He stated the limits of the power of Congress in this respect, as follows:

"'It may safely be affirmed that the reserve power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again; in *Holyoke Company* v. *Lyman*, 15 Wall., 519, 21 L. Ed. 139. 'To protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.'"

He further said:

"* * * In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into."

Thus it appears from the prevailing opinion that Congress, once having entered into a contract with a corpora-

tion or individual for a valid consideration, cannot unmake that contract.

A further discussion of principles underlying this limitation upon the power of Congress, is found in the dissenting opinion of Mr. Justice Strong in the same case, in which he says:

> "'When a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' 3 Hamilton's Works 518. Opinions similar to this have often found expression in judicial decisions, even in those of this Court. If this be sound doctrine, it is as much beyond the power of a Legislature, under any pretense, to alter a contract into which the government has entered with a private individual, as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors."

The Court further observed that Congress being a body having limited powers, is nowhere vested with the right to impair the obligation of contracts. The Court said:

> "Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to State legislation. For such legislation the prohibition was

necessary; for State Legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the 84th number of the Federalist, 'Why declare that things shall not be done which there is no power to do?' Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the government, or some department or officer thereof. I search in vain for any express or implied grant of power to add new terms to any existing contracts made by or with the government, or any grant of power to destroy vested rights. No power has been given to Congress to lessen the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. Even a bankrupt law cannot be enacted applicable only to single corporations or single debtors. To be constitutional, it must be uniform throughout the United States. I admit that in the exercise of some of the powers granted, Congress may enact laws that indirectly affect existing contracts and lessen their obligation, but I deny that it can by any direct action, otherwise than by a bankrupt law even relieve a debtor to a private party from any duty he has assumed by his contract. Much less can it change the stipulations of the contract and impose additional liabilities upon a contractor with the government. Such an exercise of power would be making a contract for parties to which they never assented. In all the history of congressional legislation before the Act of 1878, such a power was never attempted to be exercised.

"And not only is such legislative authority not conferred upon Congress by the Constitution, but it is, in effect, expressly denied. The Fifth Amendment contains restrictions taken, in substance, from Magna Charta. Among them are the provisions that no person shall be deprived of life, liberty or property with-

out due process of law, nor shall private property be taken for public use without just compensation. These are restrictions upon legislative as well as executive power. What is due process of law is well understood. It is law in regular course of administration through courts of justice. Coke, 2 Inst. 272; *Murray* v. *Hoboken L. and Imp. Co.*, 18 How., 272, 15 L. Ed. 372. 'The terms "the law of the land," said Chief Justice Ruffin, *Hoke* v. *Henderson*, 4 Dev. (N. C.) 15, do not mean merely an Act of the General Assembly. If they did, every restriction upon legislative authority would be at once abrogated, and private property would be at the mercy of the Legislature.' Yet the Act of 1878 does attempt by its own force, and without any judicial action, not only to change a contract and increase its obligations, but also to deprive the Railroad Companies of their property. * * *"

Mr. Justice Field, in the same case, likewise concurred in this view in making the following observations:

"In the Federalist, Mr. Madison declared that laws impairing the obligation of contracts were contrary to the first principles of the social compact and to every principle of sound legislation; and in the Dartmouth Coll. Case Mr. Webster contended that Acts, which were there held to impair the obligation of contracts, were not the exercise of a power properly legislative, as their object and effect was to take away vested rights. 'To justify the taking away of vested rights,' he said, 'there must be a forefeiture, to adjudge upon and declare which is the proper province of the judiciary.' Surely, the Constitution would have failed to establish justice had it allowed the exercise of such a dangerous power to the Congress of the United States.

"In the second place, legislation impairing the obligation of contracts impinges upon the provision of the Constitution which declares that no one shall be deprived of his property without due process of law;

and that means by law in its regular course of administration through the courts of justice. Contracts are property, and a large portion of the wealth of the country exists in that form. Whatever impairs their value diminishes, therefore, the property of the owner; and if that be effected by direct legislative action operating upon the contract, forbidding its enforcement or transfer, or otherwise restricting its use, the owner is as much deprived of his property without due process of law as if the contract were impounded, or the value it represents were in terms wholly or partially confiscated."

From the foregoing, it appears that Congress has no implied or express power to impair the obligations arising under a vested contract entered into by and between the Government and an individual, any more than a State has that right. Congress is restricted, as a matter of fact, from impairing the obligations of contracts by the Fifth Amendment to the Constitution where such legislation affects vested property rights.

7. Congress may not impair the obligation of contracts under the specious claim that it is acting to maintain the credit of the United States Government.

Probably the weakest reason of all urging the validity of Public Act No. 2, is that Congress may, in order to preserve the stability of the Government, directly cancel valid outstanding contracts to thereby maintain the credit of the United States Government. The fallacy of this reasoning is apparent when it is considered that the surest way, either for an individual or the Government, to destroy its credit is by repudiating its outstanding obligations; for, by cancelling and voiding its contracts and failing to meet its obligations, the Government, as well as an individual, destroys confidence in the integrity of its under-

takings. It is by carrying out its outstanding obligations that the Government or an individual maintains credit, not by the repudiation of such obligations. Furthermore, it is conclusively shown that there was no pressing necessity to void outstanding contracts in order to maintain the credit of the United States Government, because hardly had the Congress enacted the Economy Bill, which slashed four hundred million dollars from veterans' allowances, including the few million still due on war risk insurance policies, when Congress, within a fortnight, enacted the Reforestration Bill, appropriating five hundred million dollars for the establishment of a civilian conservation corps and the planting of saplings.

If there had been any emergency existing, requiring Congress to take drastic steps for the curtailment of its expenditures, including the repudiation of its obligations, as was done in the Economy Bill, its action in appropriating a greater amount of money immediately thereafter than was saved by the reductions proposed in the Economy Act is definite evidence of the fact that Public Act No. 2, being an act to maintain the credit of the United States Government, was a misnomer; was unnecessary and unjustified in view of the financial condition of the United States Government at the time it was enacted.

While this is not determinative of the question involved in the case, we are simply calling the Court's attention to the fact that the Government should not be permitted to hide behind the false cloak of economy in asserting that public necessity required the enactment of Public Act No. 2, including the abrogation of its war risk insurance contracts, when, as a matter of fact, there was no such emergency.

This Court has already held that "The war, or the conditions which followed it, did not suspend or affect the pro-

vision of the Federal Constitution that just compensation must be made for property taken for public use."

U. S. v. *Cohen Grocery Company*, 255 U. S. 81, 88, 65 L. Ed. 516, 14 A. L. R. 1045.

U. S. v. *New River Collieries Company*, 262 U. S. 340, 67 L. Ed. 1014.

8. The Fifth Amendment is self-executing, and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions.

"The rule is thus stated by Judge Cooley in his work upon Constitutional Limitations (p. 99): 'A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.'

"Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution. But where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions. In short, if complete in itself, it executes itself."

Davis v. *Burke*, 179 U. S. 399, 403, 21 S. Ct. 210, 45 L. Ed. 249.

See, also, as to the presumption that it is self-executing:

6 R. C. L. 58, Sec. 53.

Winchester v. *Howard*, 136 Calif. 432, 64 P. 692.

State v. *Kyle* (Missouri) 166 Mo. 287, 56 L. R. A. 115.

State v. *Ross*, 114 La. 898, 81 So. 386.

State v. *Hall*, 44 N. D. 459, 171 N. W. 213.

Brice v. *McDow*, 116 S. C. 324, 108 S. E. 84.

Thorne v. *Clarksburg*, 88 W. Va. 251, 106 S. E. 644.

Stevens v. *Benson*, 50 Or. 269, 91 Pac. 577.

Bareham v. *Rochester*, 128 Misc. 642, 220 N. Y. Sup. 566 (3).

Detroit v. *Oakland Circuit Judge*, 237 Mich. 446, 212 N. W. 207 (3).

Chick Spr. Water Co. v. *State Highway Dept.*, 159 S. C. 481, 157 S. E. 842 (3-9).

Johnson v. *Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779.

Householder v. *Kansas City*, 83 Mo. 488.

McElroy v. *Kansas City*, 21 Fed. 257.

Willis v. *St. Paul Sanitation Co.* (Minn.) 48 Minn. 140, 16 L. R. A. 281, and annotations following.

Chambers v. *Cincinnati & Ga. R. Co.*, 69 Ga. 320.

Conclusion.

(a) We submit that Public Act No. 2, inspfar as it voided the war risk insurance contracts upon which claims had been filed in the Veterans Administration, but which were undetermined at the time of the enactment of Public Act No. 2, is null and void and unconstitutional, because it deprives the holder of the policy; deprives plaintiff's intestate in the case at bar, of a vested right.

(b) We further contend that in providing for war risk insurance and granting its consent to be sued, the United

States did not act in its sovereign capacity and hence it cannot withdraw any rights which became vested under said contract.

(c) We submit that Congress has no right to impair the obligation of plaintiff's intestate's contract, under Article V of the United States Constitution, which prohibits the Federal Government from depriving any person of property without due process of law.

(d) We submit that there is no provision in the United States Constitution directly or indirectly authorizing the United States to impair the obligations of a contract into which it has entered with an individual or corporation, except in pursuance of a direct grant, such as is provided for under the provision of the Constitution authorizing Congress to provide uniform bankruptcy laws, or under such circumstances as in the execution of express powers, an outstanding contract may be indirectly affected.

(e) We submit that the Fifth Amendment to the Constitution, which provides that no person shall be * * * deprived of * * * property without due process of law, nor shall private property be taken for public use without just compensation, deprives Congress of the right to legislate back to itself, without making compensation, a contract previously made.

(f) We submit that the Fifth Amendment is self-executing, and needs neither the War Risk Insurance Act nor the Tucker Act to aid the carrying out of its provisions.

For the foregoing reasons, we respectfully submit that the motion of the defendant to dismiss the declaration filed in this case should have been denied.

Respectfully submitted.

ROWLAND W. FIXEL,
ARTHUR E. FIXEL,
2400 *Buhl Building, Detroit, Mich.*,
JOHN J. MCCREARY,
Monica Court, Macon, Ga.,
M. FROOME BARBOUR,
Traction Building, Cincinnati, Ohio,
Attorneys for Petitioner.

(4689-C)

INDEX.

		Page
1.	The writing of war risk term insurance by the Government as provided by act of Congress was not the exercise of a sovereign power	2
2.	The Government's withdrawal of the right to sue in the case at bar, impaired the obligation of plaintiff's war risk insurance contract	3
3.	Defendant's authorities cited do not sustain the proposition that Congress could withdraw consent to sue the United States on these insurance contracts	4
	Conclusion	7
	Relief sought	8

Cases Cited.

Beers v. Arkansas, 20 How. 527	5
Central Pacific R. R. Company v. Gallatin, 99 U. S. 732	2
Cooke v. United States, 91 U. S. 389	6
DeGroot v. United States, 5 Wall. 419	5
Gunn v. Barry, 15 Wall. 610	3
Hans v. Louisiana, 134 U. S. 1	5
Harris v. United States, 5 Fed. Supp. 368	6
Illinois C. R. Company v. Public Utilities Commission, 245 U. S. 493	5
Johnson v. Emergency Fleet Corp., 280 U. S. 320	5
Josiah Fisk v. Police Jury of Jefferson, Left Bank, 116 U. S. 132, 134	6
Kansas v. United States, 204 U. S. 331	5

Kawananakoa v. Polyblank, 205 U. S. 349 5
Memphis and Charlestown Railroad Company v. State of Tennessee et al., 101 U. S. 339 4
Schillinger v. United States, 155 U. S. 163 5
Standard Oil Company v. United States, 267 U. S. 79 2
United States v. Babcock, 250 U. S. 328 5
United States v. Clarke, 8 Pet. 436 5
United States v. Eckfords Executors, 6 Wall. 484 5
United States v. Guthrie, 17 How. 284 5
United States v. Heinszen, 206 U. S. 370 6
Van Hoffman v. Quincy, 4 Wall. 535 3
Walker v. Whitehead, 16 Wall. 314 3

In The

Supreme Court of the United States

October Term, 1933.

No. 855.

MRS. MARGARET SHEA LYNCH,
Plaintiff and Appellant,

v.

THE UNITED STATES OF AMERICA,
Defendant and Appellee.

REPLY BRIEF FOR MARGARET SHEA LYNCH.

Defendant in its brief takes the position that Congress may withdraw its consent to be sued in any case, where such consent has previously been given, regardless of the nature of the contract between the United States and the other contracting party, even though by doing so, a vested contract right is impaired. This position is not tenable.

While Congress may withdraw its consent to have the United States sued on a contract or obligation involving the exercise of the Government's sovereign powers, such

consent to be sued, may not be withdrawn by the Government, where the contract relates to nonsovereign functions of the United States, and rights have vested thereunder.

1. The writing of war risk term insurance by the Government as provided by act of Congress was not the exercise of a sovereign power.

The contract of war term insurance made by the United States with plaintiff's intestate was an ordinary insurance contract based on the payment of premiums by the soldier. The purchase of the insurance was optional, not compulsory. The sale of the insurance was not even remotely related to the Government's sovereign powers. As was said by Mr. Justice Holmes, in *Standard Oil Company v. United States, 267 U. S. 79*, a case relating to war risk insurance:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business."

The Government by writing insurance, stepped down into the arena of business. It divested itself of sovereignty. In such a case it is to be treated as a citizen, rather than a sovereign.

This rule was announced by Mr. Justice Strong in *Central Pacific R. R. Company v. Gallatin, 99 U. S. 732*, as follows:

> "It is as much beyond the power of a legislature under any pretense, to alter a contract into which the Government has entered, with a private individual, as it is for any other party to a contract to change

its terms without the consent of the person contracting with him. *As to its contract the Government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors.*"

If the writing of war risk insurance was not the exercise of a sovereign function, then the theory advanced by the United States, that the Government could withdraw its consent to be sued by reason of its sovereignty, is inapplicable.

2. The Government may not withdraw the right to sue in the case at bar, because such withdrawal impairs the obligation of plaintiff's war risk insurance contract.

When the Government enters into a business contract, not as sovereign but as an ordinary contractee as in the case at bar, the Government may not withdraw the right to sue on such contract after rights have vested in the other contracting party. The right to sue on the contract, is a part of the contract, and if the right to sue, has been impaired, the contract itself has been impaired. In our brief in support of petition for writ of certiorari, we cited in support of this proposition the following cases:

Van Hoffman v. Quincy, 4 Wall. 535;
Walker v. Whitehead, 16 Wall. 314;
Gunn v. Barry, 15 Wall. 610.

Withdrawal by the Government, of its consent to be sued, being an impairment of plaintiff's contract, rights, the withdrawal of consent to be sued, is inoperative in the case at bar.

As stated by Mr. Justice Waite, in the case of *Memphis and Charlestown Railroad Company v. State of Tennessee et al., 101 U. S. 339:*

> "The principle is elementary that a state cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the state had withdrawn its consent to be sued, and *the only question now to be determined is, whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did, it was inoperative, so far as this suit is concerned, and the original consent remains in full force, for all the purposes of the particular contract or liability here involved.*"

We accordingly submit that the Government may not withdraw its consent to be sued, as such withdrawal would be an impairment of the contract.

3. Defendant's authorities cited do not sustain the proposition that Congress could withdraw consent to sue the United States on these insurance contracts.

None of the cases, cited and relied upon by defendant, is authority for the proposition, that where a contract is entered into by the United States in a nonsovereign capacity, for a valuable consideration, and permission to sue is given thereon, and rights have become vested thereunder, the United States thereafter, may, by legislation, abrogate such rights, cancel the contract, repeal the legislation on which the contract is based, without leaving any remedy or tribunal for the litigation of claims arising by reason of such contract.

An examination of the cases cited by defendant, shows that those cases may be distinguished in theory and principle from the case at bar.

In *United States v. Babcock, 250 U. S. 328,* and *Johnson v. Emergency Fleet Corp., 280 U. S. 320,* the actions were barred by statutory limitations.

In *Schillinger v. United States, 155 U. S. 163; Hans v. Louisiana, 134 U. S. 1;* and *Kansas v. United States, 204 U. S. 331,* no right to sue had ever been granted.

In *Kawananakoa v. Polyblank, 205 U. S. 349,* no contract was involved. The point decided was that Hawaii could not be sued without its consent with reference to land which was a part of its sovereign domain.

In *Illinois C. R. Company v. Public Utilities Commission, 245 U. S. 493,* the suit was brought in a court, not designated by statute as the proper court in which to commence the action.

In *United States v. Clarke, 8 Pet. 436,* the statute was not followed.

In *United States v. Guthrie, 17 How. 284,* jurisdiction to bring mandamus had never existed. Hence jurisdiction was not withdrawn.

In *Beers v. Arkansas, 20 How. 527,* plaintiff failed to comply with a condition precedent, namely, the deposit of the bonds sued upon, as required by statute.

In *United States v. Eckfords Executors, 6 Wall. 484,* no law authorized defendant's claim to a set-off.

In *DeGroot v. United States, 5 Wall. 419,* and *Gordon v. United States, 7 Wall. 188,* Congress relegated the plaintiffs to the court of claims. Plaintiffs were not deprived of their right to sue.

In *Gordon v. United States, supra,* the Supreme Court in commenting on the repeal of the law under which Gordon prosecuted his claim, expressly held that Congress' right to repeal a law authorizing suit against the United States is not unlimited. The language used follows:

> "The power that created this tribunal might rightfully destroy it, *unless some rights had accrued which were the result of the creation of such tribunal and inseparable from it.*"

In the case at bar, plaintiff's right under the insurance contract accrued long before the repealing act took effect.

Also see:

State of Louisiana ex rel.;
Josiah Fisk v. Police Jury of Jefferson, Left Bank, 116 U. S. 132, 134;
Cooke v. United States, 91 U. S. 389.

In *United States v. Heinszen, 206 U. S. 370,* the suit was not upon a contract. It involved the exercise of a sovereign right by the United States under its tariff laws, hence was barred.

The court in *Harris v. United States, 5 Fed. Supp. 368,* held Sec. 17 of the Economy Act (that being the section under consideration) to be unconstitutional, and the action would have proceeded had there been an allegation of a disagreement, the latter being a condition prerequisite to suit.

The court in *Harris v. United States, supra,* recognized the doctrine that consent to be sued may not be withdrawn under this state of facts.

Each case cited by the defendant, contains some element (not present in the case at bar) which deprives plaintiff of his right to sue, such as, failure to comply with a condition precedent; failure to file the claim within the statutory limitation; failure of Congress originally to grant a right to sue; vesting jurisdiction in a different tribunal than the one in which suit was brought; or where the exercise of a sovereign power defeated the right to litigate the claim.

Defendant bases its right to withdraw its consent to be sued in this case, on its *status* as a sovereignty. However, as the contract at bar was not made in the exercise of any of the sovereign powers of the Government, but in its private or nongovernmental capacity, the relation was one of debtor and creditor. And since rights vested under that contract long prior to the withdrawal of defendant's consent to be sued, plaintiff is deprived of property, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, by the cancellation of the contract of insurance, and by abrogation of the right to sue thereon.

CONCLUSION.

1. The writing of war risk term insurance was not the exercise of a sovereign power.

2. Withdrawal of the right to sue on said insurance contract impaired the obligation of the contract.

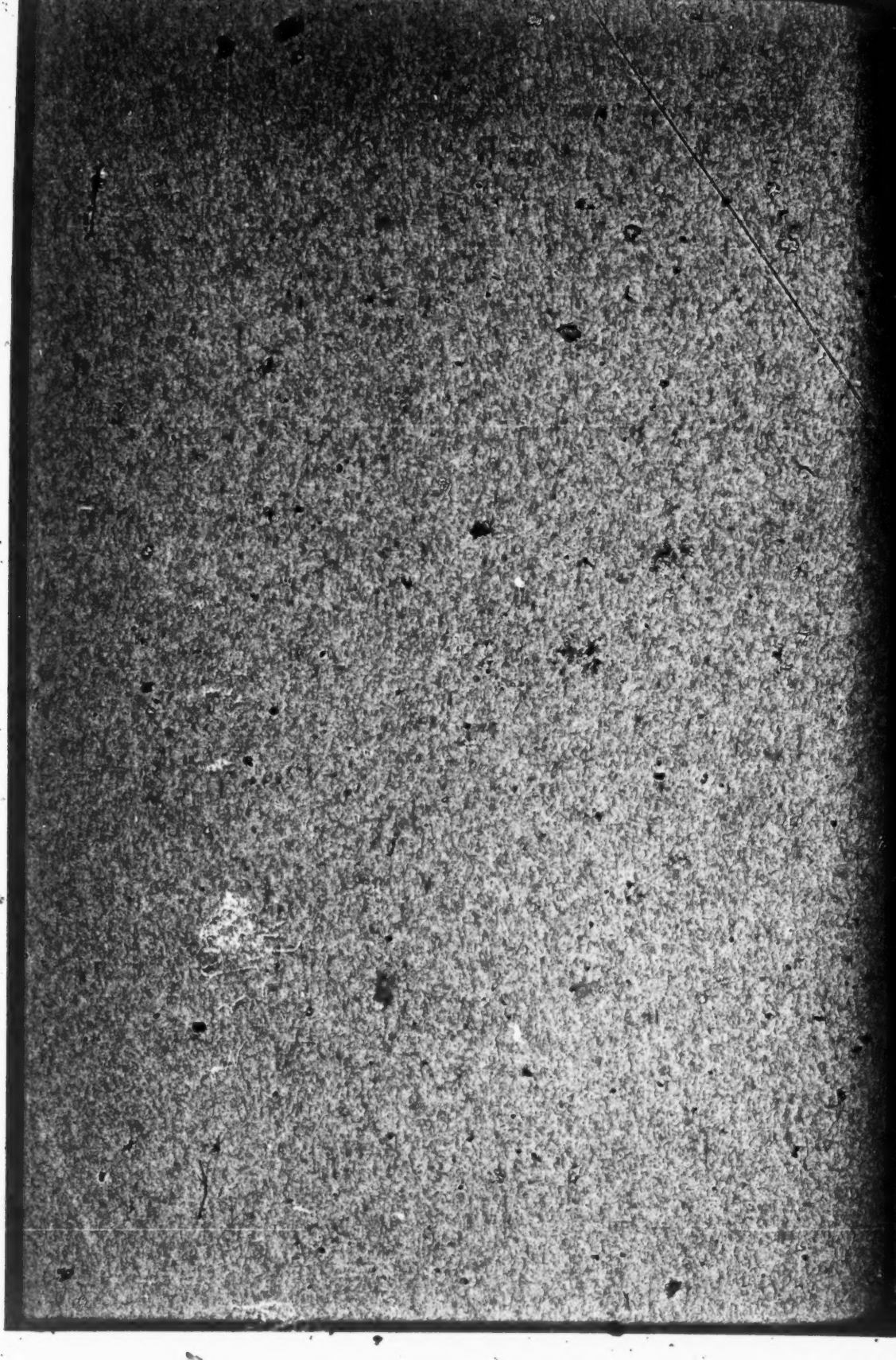
3. Defendant's authorities do not sustain the proposition that Congress could withdraw consent to sue the United States on these contracts.

RELIEF SOUGHT.

The judgment of the Fifth Circuit Court of Appeals in this case should be reversed.

ARTHUR E. FIXEL,
ROWLAND W. FIXEL,
JOHN J. McCREARY,
M. FROME BARBOUR.

2400 Buhl Bldg.,
Detroit, Michigan.



In The

Supreme Court of the United States

October Term, 1963.

No. 298.

MRS. MARGARET SHEA LYNCH, *Petitioner,*

v.

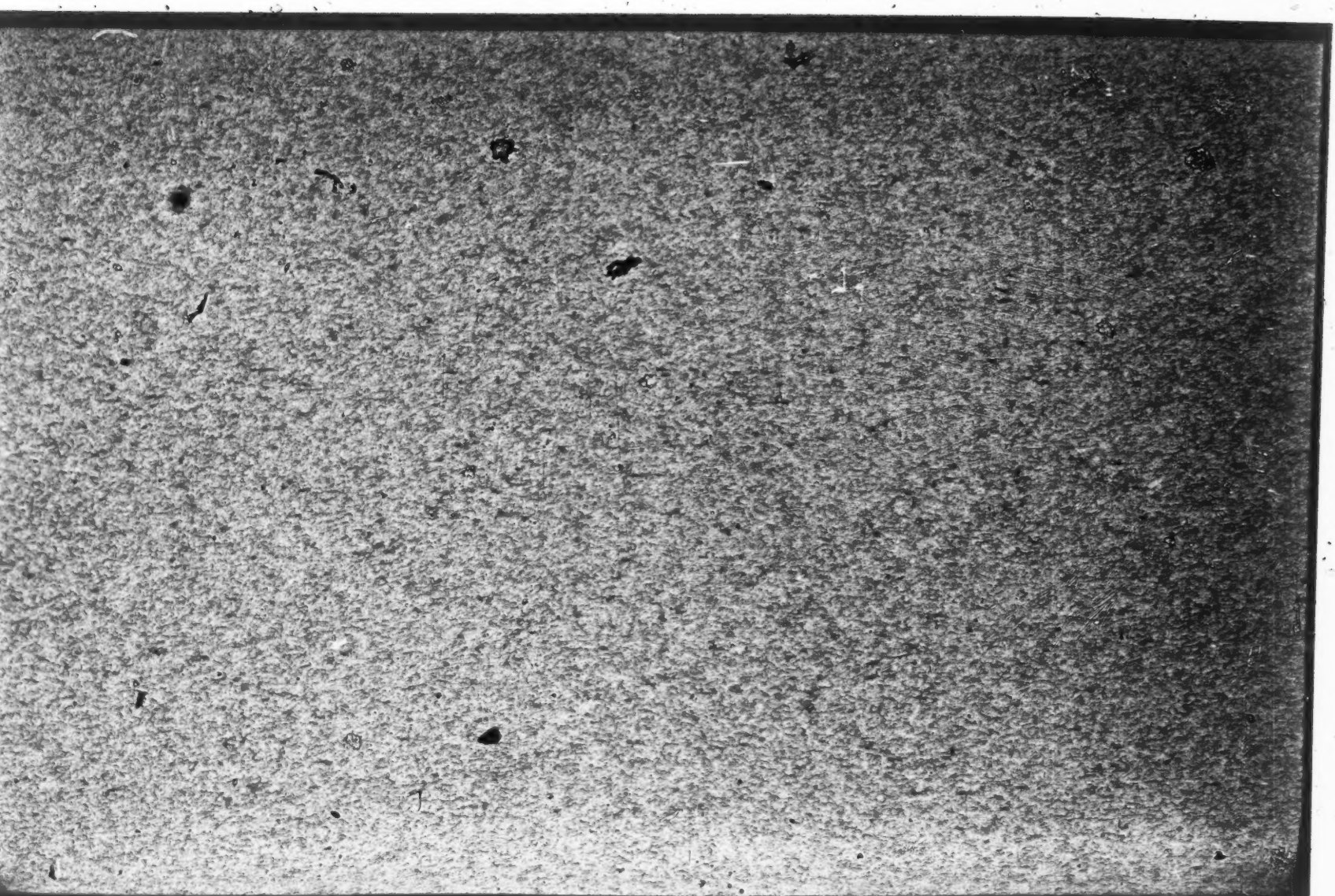
THE UNITED STATES OF AMERICA.

On Writ Of Certiorari To the United States Circuit Court Of Appeals For the Fifth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

ARTHUR E. FIXEL,
ROWLAND W. FIXEL,
JOHN J. McCREARY,
M. FROME BARBOUR,
Attorneys for Petitioner.

NATIONAL LAW PRINTING CORPORATION, 1010 VERMONT AVENUE, WASHINGTON 5, D. C.



INDEX.

		Page
1.	The declaration sufficiently stated a case bringing it within the jurisdictional limitation....	1-2
2.	Consent to be sued may not be withdrawn, where such withdrawal impairs the obligation of a contract	2-3
3.	A perfected right under a contract may not be extinguished by subsequent legislation although the form of remedy may be changed..	4-5

Authorities Cited.

Bryson v. Hines, 268 Fed. 290	4
Creighton v. Pragg, 21 Cal. 115	4
Graham, Ex parte, 13 Rich. Law 277	4
Lyon v. Bertram, 20 How. 151	2
Prusseaux v. Welch, 2 West L. M. 209	4
Rice v. R. Company, 1 Black 358	4
Sinking Fund Commissioners v. Northern Bank, 1 Met. 174	4
Steamship Company v. Joliffe, 2 Wall. 450.....	4
Struebel v. Milwaukee, 13 Wis. 67	4
Title 38 U. S. C. A., Sec. 442 as amended July 3, 1930, c. 849, Par. 3, 46 Stat. 992.....	3
20 Law Ed. (U. S.) 154	4

In The

Supreme Court of the United States

October Term, 1933.

No. 855.

MRS. MARGARET SHEA LYNCH, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

On Writ Of Certiorari To the United States Circuit Court Of Appeals For the Fifth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

The Government brief and supplementary brief require an answer.

1. The Declaration Sufficiently Stated a Case Bringing It Within the Jurisdictional Limitation.

The declaration alleged (a) that the insured became totally and permanently disabled while said policy was

in force, (b) that a claim thereon was filed, (c) that the Veterans' Administration denied the claim solely by reason of the repealing clause in the Economy Act.

In order to bar the suit defendant's plea must be an answer to any case which may be established under the declaration. Such plea cannot be sustained if it rests for its validity upon a supposed state of facts which may not exist.

Lyon v. Bertram, 20 How. 151.

In the case at bar the declaration permits plaintiff to prove that every jurisdictional element was complied with. The declaration is sufficiently broad to permit proof of all necessary jurisdictional elements.

2. Consent To Be Sued May Not Be Withdrawn, Where Such Withdrawal Impairs the Obligation Of a Contract.

The distinction between the cases cited by the Government in its supplemental brief (pages 3-4) and the case at bar, is that in the cases cited, the law withdrawing consent to be sued, did not cancel the contract obligation, and all except the Alabama case provided for declaratory or advisory judgments, instead of final judgments on which execution might issue.

In the Alabama case, while it was the duty of the Comptroller to pay the judgment, such duty is not comparable to the duty of the Bureau under the war risk insurance statutes.

(1) A great deal of the money payable on war risk insurance obligations arose from premium payments. Over 500 million dollars was received by the United

States on such payments (Cong. Record Mar. 14, 1933, p. 342) and this was covered into the Treasury to the credit of the military and naval insurance appropriation.

(2) All sums appropriated prior to July 3, 1930, for military and naval insurance where unexpended, were likewise covered into the Treasury to be made available for the Bureau.

(3) *All premiums collected after July 3, 1930, on yearly renewable term insurance were required to be deposited and covered into the Treasury and "made available for the payment of the liabilities of the United States incurred under contracts of yearly renewable term insurance * * * including the refund of premiums and such liabilities as shall have been or shall hereafter be reduced to judgment in a district court of the United States or in the Supreme Court of the District of Columbia.*

Title 38 U. S. C. A., Sec. 442 as amended July 3, 1930, c. 849, Par. 3, 46 Stat. 992.

(4) Under the foregoing law, a fund exists or should exist, if the same has not been dissipated, for the payment of legitimate claims arising on the war term policies. The necessity to secure a specific appropriation with which to pay a judgment is thus removed from consideration. In this respect it differs from judgments rendered in the Court of Claims.

3. A Perfected Right Under a Contract May Not Be Extinguished By Subsequent Legislation, Although the Form Of Remedy May Be Changed.

The evil of Sec. 17 of the Economy Act is that it obliterates the contract, and likewise extinguishes all forms of remedy thereon. In this it is unlike *Bryson v. Hines, 268 Fed. 290,* cited by defendant. For in that case while the Director General was relieved from suits of a certain nature, the complainant was provided a remedy in the War Risk Insurance Bureau.

In a note found in *20 Law Ed. (U. S.) 154*, the following statement appears:

> "When a right has arisen under a contract, or a transaction in the nature of a contract authorized by statute, has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."
>
> *Steamship Company v. Joliffe, 2 Wall. 450;*
> *Struebel v. Milwaukee, 13 Wis. 67;*
> *Rice v. R. Company, 1 Black 358;*
> *Prusseaux v. Welch, 2 West L. M. 209;*
> *Sinking Fund Commissioners v. Northern Bank, 1 Met. 174;*
> *Creighton v. Pragg, 21 Cal. 115;*
> *Ex parte Graham, 13 Rich. Law 277.*

The prevailing opinion in the *Sinking Fund cases* bears this out, for Mr. Justice Waite who wrote the court's opinion said:

> "No change can be made in the title created by the grant of land, or in the contract for the subsidy bonds, without consent of the corporation. All this

> is indisputable * * * it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be made for the due performance of contracts already entered into."

This case establishes the rule that the Government may not cancel a valid outstanding contract, under which vested rights have accrued. To hold otherwise would be to disregard the Fifth Amendment to the Constitution.

We submit that the judgment should be reversed.

ARTHUR E. FIXEL,
ROWLAND W. FIXEL,
JOHN J. McCREARY,
M. FROME BARBOUR,
Attorneys for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Discussion	3
Appendix	4

CITATIONS

Statutes:	
World War Veterans' Act, 1924, Sec. 19 as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, Sec. 4	4
Economy Act of March 20, 1933, c. 3, 48 Stat. 8, 9, 11:	
Sec. 5	4
Sec. 17	5
Miscellaneous:	
Executive Order, entitled Veterans Regulation No. 8, par. V	5

49450—34

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 24–25) is reported in 67 F. (2d) 490.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 3, 1933. (R. 26.) A petition for rehearing was denied December 14, 1933. (R. 28.) The petition for a writ of certiorari was filed March 12, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the provisions of the Act of March 20, 1933, validly deprived the courts below of jurisdiction to adjudicate a claim for insurance benefits alleged to have arisen under a contract of war risk insurance in force between May 30, 1918 and September 1, 1919.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 4–5.

STATEMENT

The petitioner filed suit in the District Court of the United States for the Middle District of Georgia on April 21, 1933, seeking recovery of death benefits alleged to be payable under a contract of war risk term insurance issued to the petitioner's son, Thomas Stephen Lynch, who died intestate on November 27, 1924. (R. 1–3.) The petitioner was the designated beneficiary of the insurance.

Asserting that adjudication of the claim had been refused because of the provisions of the Act of March 20, 1933 (R. 3, 8, 11–12) the petitioner alleged the constitutional invalidity of that Act on various grounds set forth in the petition (R. 3–5, 8–10). The respondent demurred to the petition (R. 13–14) and the demurrer was sustained by the District Court (R. 17). On appeal to the Circuit Court of Appeals the judgment of the District

Court was affirmed on the ground that the Act of March 20, 1933, repealing all war risk term insurance laws and withdrawing the Government's consent to be sued thereunder validly deprived the District Court of jurisdiction. A petition for rehearing was filed and denied. (R. 26–28.)

DISCUSSION

As we view it the question in this case is identical in substance with that presented in the case of *Wilner* v. *United States,* in which a petition for a writ of certiorari, No. 861, October Term, 1933, was filed March 14, 1934. For the reasons set forth in the Government's brief in opposition in that case it is respectfully submitted that the petition herein should be denied.

J. CRAWFORD BIGGS,
Solicitor General.

APRIL 1934.

APPENDIX

STATUTES AND REGULATIONS

Section 19 of the World War Veterans' Act, 1924, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, Sec. 4, provides:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> * * * * *
>
> The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. * * *

The Economy Act of March 20, 1933, c. 3, 48 Stat. 8, Secs. 5 and 17, provided as follows:

> SEC. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and

> conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.
>
> SEC. 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * * *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *.

Pursuant to the authority vested by the provisions of the Act of March 20, 1933, *supra,* the President of the United States issued an Executive Order entitled Veterans Regulation No. 8, paragraph V of said order being as follows:

> Except as stated above, no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims or claims hereafter filed for such benefits shall be disallowed.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	3
Argument:	
I. Jurisdiction and consent to be sued were withdrawn before the suit was brought	4
II. The present suit is not shown to have been filed in time	10
Conclusion	12
Appendix I. Statutes and regulations involved	13
Appendix II. Legislative history of the Act of March 20, 1933	19

CITATIONS

Cases:	
Beers v. *Arkansas*, 20 How. 527	7
Bryson v. *Hines*, 268 Fed. 290	8
Carpenter v. *United States*, 56 F. (2d) 828	11
Compagnie Generale Transatlantique v. *United States*, 51 F. (2d) 1053	11
Crouch v. *United States*, 266 U.S. 180, 8 F. (2d) 435	4
De Arnaud v. *United States*, 151 U.S. 483	12
De Groot v. *United States*, 5 Wall. 419	7
Finn v. *United States*, 123 U.S. 227	11
Hans v. *Louisiana*, 134 U.S. 1	6
Harris v. *United States*, 5 F.Supp. 368	4
Harrisburg, The, 119 U.S. 199	12
Hill v. *United States*, 149 U.S. 593	6
Louisville Cement Co. v. *Interstate Commerce Commission*, 246 U.S. 638	12
Mara v. *United States*, 54 F. (2d) 397	4
Miller v. *United States*, 57 F. (2d) 889	11
Schillinger v. *United States*, 155 U.S. 163	6
United States v. *Babcock*, 250 U.S. 328	6
United States v. *Densmore*, 58 F. (2d) 748	11
United States v. *Lee*, 106 U.S. 196	8
United States v. *McGovern*, 299 Fed. 302, appeal dismissed, 267 U.S. 608	4
United States v. *Pfitsch*, 256 U.S. 547	4
Western Fuel Co. v. *Garcia*, 257 U.S. 233	12

Statutes: Page

Act of October 6, 1917, c. 105, 40 Stat. 398, 409, 410:
Sec. 400 13
Sec. 401 13
Sec. 402 14
Sec. 403 14
Sec. 404 14
Sec. 405 15
Act of June 7, 1924, c. 320, 43 Stat. 608, 612:
Sec. 5 as amended 16
Sec. 19 as amended 16
Act of July 3, 1930, c. 849, 46 Stat. 991, 992:
Sec. 1 17
Sec. 4 17
Act of March 20, 1933, c. 3, 48 Stat. 8, 9, 11:
Sec. 5 17
Sec. 17 17
Tucker Act (Judicial Code, Sec. 24 (20), U.S.C., Title 28, Sec. 41 (20) 18

Miscellaneous:
Bulletin No. 1, promulgated by Director of the Veterans' Bureau on October 15, 1917 15
H.Rept. No. 1, 73d Cong., 1st Sess., March 11, 1933, pp. 5–6 19
S.Rept. No. 1, 73d Cong., 1st Sess., March 11, 1933, pp. 4–5 20
Cong. Rec. Vol. 77, Pt. 1:
Page 199 19
Page 276 20
Page 355 20
Pages 364–365 21
Page 471 21
Page 551 21
Page 561 22

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 24–25) is reported in 67 F. (2d) 490.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 3, 1933. (R. 26.) A petition for rehearing was denied December 14, 1933. (R. 28.) The petition for a writ of certiorari was filed March 12, 1934, and granted April 9, 1934. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 17 of the Economy Act of March 20, 1933, *infra,* p. 17, deprived the courts below of jurisdiction to entertain a suit against the United States on a contract of yearly renewable term insurance issued under the War Risk Insurance Act of 1917.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix I, *infra,* pp. 13–18.

STATEMENT

The petitioner filed this suit in the District Court April 21, 1933, to recover death benefits alleged to be due her as the beneficiary designated in the contract of yearly renewable term insurance issued to her son Thomas Stephen Lynch during service in the United States Army between May 30, 1918 and an undesignated date in the year 1919. (R. 1.)

The petition alleged that Thomas Stephen Lynch, the insured, died November 27, 1924; that although no premiums had been paid on his insurance since July, 1919 the insured became permanently and totally disabled and the insurance thereby matured prior to September 1, 1919, the date on which the grace period expired. (R. 2.)

The petitioner further alleged that she had "made due proof" of the insured's death and requested payment of benefits but that on March 29, 1933, the Director of Insurance of the Veterans' Administration advised her by letter that further consideration of her claim was barred by the Economy Act of 1933. She claimed that this Act was unconstitutional and void on various grounds set forth in the petition. (R. 2–5, 7–10.) The respondent demurred to the petition and the demurrer was sustained by the District Court. (R. 17.) On appeal to the Circuit Court of Appeals for the Fifth Circuit the judgment of the District Court was affirmed on the ground that the Economy Act, repealing all war risk term insurance laws and withdrawing the Government's consent to be sued thereunder, had deprived the District Court of jurisdiction. (R. 24–25.) A petition for rehearing was filed and denied. (R. 26–28.)

SUMMARY OF ARGUMENT

1. Jurisdiction of the case, and the consent of the defendant to be sued, were withdrawn by the Act of 1933 before the suit was brought.

2. The petition fails to show that the suit was filed in time under the prior law.

ARGUMENT

I

JURISDICTION AND CONSENT TO BE SUED WERE WITHDRAWN BEFORE THE SUIT WAS BROUGHT

Jurisdiction was refused below because of Sections 5 and 17 of the Economy Act of March 20, 1933, *infra*, p. 17. (R. 25.)

Section 5 does not concern war risk insurance, and Section 17 is the controlling section. By that section "all laws granting or pertaining to yearly renewable term insurance [1] are hereby repealed", with certain saving provisos which do not include this case. The repeal includes the section under which suits on such policies have hitherto been brought in District Courts (World War Veterans' Act, 1924, Sec. 19, as amended by Act of July 3, 1930, c. 849, 46 Stat. 991, 992, *infra*, p. 16) and under which this suit was brought.[2] The repeal

[1] Such insurance should not be confused with the permanent converted insurance policies issued subsequently to the war to yeterans who elected to convert their temporary wartime insurance into a permanent form of Government insurance. The Act of March 20, 1933, does not affect the latter form of insurance.

[2] It was well settled, prior to the passage of the Act of 1933, that jurisdiction of suits on war risk policies was under the section cited, and not under the Tucker Act, and that, therefore, the plaintiff was entitled to a jury trial. *United States* v. *Pfitsch*, 256 U.S. 547, 552–553; *Crouch* v. *United States*, 266 U.S. 180, 8 F. (2d) 435; *United States* v. *McGovern*, 299 Fed. 302, appeal dismissed, 267 U.S. 608; *Mara* v. *United States*, 54 F. (2d) 397, 399. *Contra*, *Harris* v. *United States*, 5 F. Supp. 368 (D.C. Idaho). This suit is

preceded the filing of the present suit.[3] The situation, therefore, is that at the time the present suit was filed the only law under which jurisdiction of it was conferred upon the court had already been repealed. The court, therefore, held correctly that it had no jurisdiction.

It is clear, and not seriously disputed, that this is the meaning of the Act of 1933. That it was also the purpose of Congress is made clear by the Congressional history which we summarize in Appendix II, *infra,* pp. 19–22. The question, therefore, is the power of Congress to withdraw the jurisdiction previously given, and to terminate, before the suit was brought, the consent of the United States to be sued in such a case.

Petitioner complains that the Act of 1933 has wholly confiscated his rights under an insurance contract by repealing all the laws that grant them; but by the same Act of which he complains the courts were deprived of all jurisdiction to entertain his complaint. If such withdrawal of jurisdiction is valid, the alleged effect of the Economy Act upon petitioner's asserted contract rights can-

---

expressly brought under the World War Veterans' Act (R. 1), and the plaintiff asks a jury trial (R. 11). It could not, in any view, have been brought under the Tucker Act, because the claim exceeds $10,000 (R. 11), and also because the right accrued either in 1919 or 1924 (R. 2) and the suit was not brought within 6 years thereafter. (R. 1.) Judicial Code, Sec. 24 (20); U.S.C., Title 28, Sec. 41 (20), *infra,* p. 18.

[3] The repeal became effective March 20, 1933, 48 Stat. 8, 11, 16. The suit was instituted April 21. (R. 1.)

not be considered. The unqualified right of Congress to withdraw the consent of the United States to be sued is clear from previous decisions of this Court. It has been held that the United States when it creates a right against itself is under no obligation to provide a remedy through the courts. *United States* v. *Babcock*, 250 U.S. 328. This is true of contract rights as well as others. In *Hans* v. *Louisiana*, 134 U.S. 1, it was said (p. 13):

> The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

Even if a violation of the Constitution by the United States were involved a right of action therefor against the Government is not conferred thereby. In *Hill* v. *United States*, 149 U.S. 593, jurisdiction to determine whether the United States had violated the Fifth Amendment in appropriating plaintiff's property was expressly declined on the ground that the alleged taking sounded in tort and that the United States had not consented to be sued in tort, and in *Schillinger* v. *United States*, 155 U.S. 163, 168, this Court said:

> It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the government, no matter however wrongfully made, creates a claim founded upon the Constitution of the

> United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual, or seizure of his property by an officer of the government, should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

Moreover, it would seem immaterial that consent was previously given, for, as was pointed out by Chief Justice Taney in *Beers* v. *Arkansas,* 20 How. 527, 529, as permission to sue "is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions under which it consents to be sued * * * *and may withdraw its consent* whenever it may suppose that justice to the public requires it." (Italics ours.)

In *De Groot* v. *United States,* 5 Wall. 419, dealing with the Court of Claims, this Court said (p. 432):

> It is true that ordinarily, when we seek for the foundation of this jurisdiction, we

> look to the general laws creating the court, and defining causes of which it may have cognizance. But is equally true that whenever Congress chooses to withdraw from that jurisdiction any class of cases which had before been committed to its control, as it has done more than once, it has the power to do so, or to prescribe the rule by which such cases may be determined. Its right to do this in regard to any particular case, as well as to a class of cases, must rest on the same foundation; and no reason can be perceived why Congress may not at any time withdraw a particular case from the cognizance of that court, or prescribe in such case the circumstances under which alone the court may render a judgment against the government.

There is no difference, we submit, between an asserted violation of the Fifth Amendment involving a contractual obligation and one which does not; nor does a different situation arise where the right to sue is withdrawn from that which arises when it has never been conferred.

Of course, where a right has vested in an individual to sue one other than the United States, Congress may be without power to remove that right. Its absolute power to take away a right to sue applies only where the suit is against the Government. This power is inherent in the status of the Government as a sovereign. *United States* v. *Lee*, 106 U.S. 196, 206. The distinction is illustrated in *Bryson* v. *Hines*, 268 Fed. 290 (C.C.A. 4th), where

actions were brought by the administrators of two soldiers against a railroad and the Director General of Railroads for damages on account of the deaths of the soldiers alleged to have been due to the negligence of the defendants. The defense set up was that a circular issued by the Director General after the cause of action accrued deprived the plaintiffs of the right to sue. The court said (p. 295):

> As already observed, Circular No. 4 could not take away any cause of action for the negligence of the Atlantic Coast Line Railroad Company, for it existed and was a vested right before that circular was issued. The right of action had also accrued against the Director General under the federal statutes and proclamations of the President, if the train was negligently run. As the Director General was an officer of the government, the right of action was in effect against the government, and was dependent upon the permission and grant of the government found in these statutes and proclamations. *This permission and grant could, of course, be withdrawn at any time before the judgment.* (Italics ours.)

In short, whatever power Congress may have had over the petitioner's contract, directly, it clearly had the power to close the courts. Having done that before the suit was brought, it follows that the District Court had no jurisdiction of the case, and both courts below have properly so held.

II

THE PRESENT SUIT IS NOT SHOWN TO HAVE BEEN FILED IN TIME

The complaint in the case at bar also lacks a jurisdictional prerequisite under Section 19 of the Act of 1924 (*infra*, p. 16) as the section stood before it was repealed. It fails to show that suit was filed within the time limited by that section, which provided:

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided*, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further*, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *

This suit was filed April 21, 1933, more than "six years after the right accrued for which the claim is made" (R. 2) and more than one year after July 3, 1930, the date of approval of the amendatory Act, (46 Stat. 992) and thus is barred unless the limitation on suit was suspended by the consideration of the claim in the Bureau. The complaint does not show the date claim was filed

in the Bureau and therefore does not allege a fact essential to the determination of the court's jurisdiction. *Miller* v. *United States*, 57 F. (2d) 889 (E.D.N.Y.). The complaint does allege that "your petitioner made due proof of said death to the defendant, * * * and requested payment of aforesaid amounts" (R. 2); but the date of such claim is not stated although essential to the determination of jurisdiction. And further, the allegation of "due proof" relates solely to death whereas the claim was wholly dependent on the alleged total permanent disability without which the insurance would have lapsed. *United States* v. *Densmore*, 58 F. (2d) 748 (C.C.A. 9th).

It is immaterial that this defect was not pleaded, and was apparently not brought to the attention of, nor considered by, either of the courts below. It is held that the provisions of Section 19 as to time are not a statute of limitations, but go to the jurisdiction of the court. *Miller* v. *United States*, 57 F. (2d) 889, 890 (E.D.N.Y.). This is in accord with decisions as to the effect of the six-year provision of the Tucker Act (*infra*, p. 18), *Compagnie Generale Transatlantique* v. *United States*, 51 F. (2d) 1053, 1056 (C.C.A. 2d); *Carpenter* v. *United States*, 56 F. (2d) 828 (C.C.A. 2d); as well as with decisions as to the similar provisions in the Acts conferring jurisdiction on the Court of Claims. *Finn* v. *United States*, 123 U.S. 227. Since a failure to sue in time is in such cases jurisdictional, it need not be pleaded, and is available at any time. *Finn*

v. *United States, supra,* at pp. 232–233; *Carpenter* v. *United States, supra,* at p. 829; *De Arnaud* v. *United States,* 151 U.S. 483, 495–496. See also *Louisville Cement Co.* v. *Interstate Commerce Commission,* 246 U.S. 638, 642; *The Harrisburg,* 119 U.S. 199, 214; *Western Fuel Co.* v. *Garcia,* 257 U.S. 233, 242–243.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.
WILLIAM STANLEY,
The Assistant to the Attorney General.
WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
FENDALL MARBURY,
CHARLES BUNN,
Special Assistants to the Attorney General.

MAY 1934.

APPENDIX I

STATUTES AND REGULATIONS

The Act of October 6, 1917, c. 105, 40 Stat. 398, 409, 410, provides in part as follows:

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000, or more than $10,000, upon the payment of the premiums as hereinafter provided.

SEC. 401. That such insurance must be applied for within one hundred and twenty days after enlistment or after entrance into or employment in the active service and before discharge or resignation, except that those persons who are in the active war service at the time of the publication of the terms and conditions of such contract of insurance may apply at any time within one hundred and twenty days thereafter and while in such service. Any person in the active service on or after the sixth day of April, nineteen hundred and seventeen, who, while in such

service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum.

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms

of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

SEC. 405. That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. * * *

Bulletin No. 1 was promulgated by the Director on October 15, 1917, and provides in part as follows:

Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of

service and before the expiration of one hundred and twenty days from and after such publication, becomes or has become totally and permanently disabled or dies, or has died, without having applied for insurance, shall be deemed to have applied for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each. If he shall die either before he shall have received any of such monthly installments or before he shall have received two hundred and forty of such monthly installments, then $25 per month shall be paid to his wife from the time of his death and during her widowhood, or to his child, or widowed mother if and while they survive him: *Provided, however,* That not more than two hundred and forty of such monthly installments, including those received by such person during his total and permanent disability, shall be so paid; and in that event the amount of the monthly installments shall be apportioned between them as may be provided by regulations.

SEC. 402. That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

SEC. 403. That the United States shall bear the expenses of administration and the excess mortality and disability cost resulting from the hazards of war. The premium rates shall be the net rates based upon the American Experience Table of Mortality and interest at three and one-half per centum per annum.

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms

of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

SEC. 405. That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides. * * *

Bulletin No. 1 was promulgated by the Director on October 15, 1917, and provides in part as follows:

Under the authority granted by Congress in an act amending "An act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, and subject in all respects to the provisions of such act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of

which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract: * * *.

The Act of October 6, 1917, *supra,* was amended by the Act of June 7, 1924, c. 320, 43 Stat. 612 (U.S.C., Title 38, Section 445.) After several intermediate amendments the Act of June 7, 1924, was amended by the Act of July 3, 1930 (c. 849, 46 Stat. 991, 992), to read in part as follows:

> SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; * * *.
>
> SEC. 19. In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> * * * * *
>
> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within

six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *

The Act of March 20, 1933 (c. 3, 48 Stat. 8, 9, 11), known as the Economy Act, provides in part as follows:

SEC. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

SEC. 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby, repealed, * * * *Provided,* That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *.

The Tucker Act (Judicial Code, Section 24 (20), U.S.C., Title 28, Section 41 (20)) provides in part as follows:

> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, * * *. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. * * *

APPENDIX II

LEGISLATIVE HISTORY OF THE ACT OF MARCH 20, 1933, C. 3, 48 STAT. 8

The bill (H.R. 2820) was introduced in the House. As introduced, Section 17 provided (Cong. Rec. Vol. 77, Part 1, p. 199):

> all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the first day of the third calendar month following the month during which this act is enacted. * * * *Provided*, that nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this act and under which payments have been commenced.

The bill was referred to the Committee on Economy, and the report of that Committee gave the following explanation of Section 17 (73d Cong., 1st sess., House Report No. 1, March 11, 1933, pp. 5–6):

> This section [Sec. 17] further repeals all laws granting or pertaining to yearly renewable term insurance, including the right to institute suit or further proceed with suits under section 19 of the World War veterans' act, 1924, as amended. * * * It is further provided that payments under contracts of yearly renewable term insurance, which matured prior to the date of the enactment of this Act and under which payments

> have been commenced, shall continue in accordance with the terms of such contracts. No new awards can be made or new payments commenced on yearly renewable term insurance under the terms of this section.
>
> Further adjudications of claims will not be permitted and all pending claims and suits are required to be dismissed. Under the provisions of this section, payment of benefits under the laws existing at the date of repeal are to continue to the first day of the third calendar month following the date of enactment.

The bill was passed by the House with the section in this form.

A bill similar to the House bill was introduced in the Senate and referred to the Finance Committee. The Finance Committee made a report in the same words as the report of the House Committee as to Section 17. (73d Congress, 1st Session, Senate Report No. 1, March 11, 1933, pp. 4–5.)

When the bill passed by the House reached the Senate, it was substituted for the Senate bill (Cong. Rec. Vol. 77, Part 1, p. 276).

The bill as passed by the House did not save pending suits on contracts of War Risk Insurance, and Senator Black introduced the following amendment to Section 17 (p. 355):

> Nor on any judgment heretofore rendered in a court of competent jurisdiction, or which may hereafter be rendered in any suit now pending.

Senator Harrison introduced a substitute for Senator Black's Amendment, which would have saved only cases in which there had been a trial prior to the enactment of the Act. (P. 355.) Sena-

tor Black in commenting on these two proposed amendments, after referring to the fact that the bill as passed by the House did not permit a soldier to collect the judgment he had obtained, said (p. 355):

> The amendment which the Senator from Mississippi now proposes, and which I shall favor if my amendment shall not be agreed to, provides that if a judgment has already been obtained the soldier can proceed to collect the judgment irrespective of the law. But it does not save the thousands of other contractual obligations upon which suits have already been filed in the Federal courts of the United States on policies of insurance bought and paid for by the veterans of the World War.
>
> * * * * *
>
> The amendment which I offer does not add a dollar to any compensation; * * *
> It simply provides where suits have been filed on contractual obligations, on these policies, that the courts shall be permitted to pass upon the claims based upon the contracts of insurance.

After some further debate Senator Black modified his amendment so that it reads as it now appears in the statute, and the Senate agreed to this amendment and rejected the amendment of Senator Harrison (pp. 364–365). As thus amended the Bill passed the Senate on March 15, 1933 (p. 471).

When the bill as amended, reached the House, the Senate amendment was explained as follows (p. 551):

> Amendment No. 19 (p. 10): This amendment saves from the effect of the repeal of the laws pertaining to yearly renewable

term war-time insurance suits filed in the courts and pending at the time of enactment of the act. All other claims are automatically barred from any future consideration. The House bill barred also pending suits from further consideration by the courts, but the Senate amendment permits such suits filed prior to the enactment of this act to continue to final judgment.

The amendment was concurred in by the House (p. 561) and the bill passed and was signed by the President on March 20, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1934

BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 855

MRS. MARGARET SHEA LYNCH, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Certain contentions made in the reply brief of the petitioner in this case require a further answer.

I

Petitioner contends that "The writing of war risk term insurance by the Government as provided by Act of Congress was not the exercise of a sovereign power" (reply brief, p. 2).

The first case cited under this contention, *Standard Oil Company* v. *United States,* 267 U.S. 76, related to a policy of marine insurance, issued in

56791—34

1915 under the Act of 1914, and on which a loss occurred in 1915. The United States was not then at war, and the insurance was a mere accommodation to the shipping interests, who found it difficult to get insurance against war risks from commercial companies. The quotation at page 2 of the reply brief from page 79 of the opinion relates merely to the question whether interest should be allowed.

The present insurance, issued originally under the Act of October 6, 1917, was clearly issued under the war powers, in particular under the power of Congress to raise and support armies. Whatever was done by Congress to pay, support, or improve the morale of its soldiers in war time was done as a sovereign and not as a matter of business.

It is not believed, however, that the distinction is of great importance, for this Court has held, in the four cases referred to below, that States may validly withdraw permission for suits against themselves, even in business contracts.

The second quotation on page 2 of the reply brief is from the dissenting opinion in the *Sinking Fund Cases,* 99 U.S. 700. The majority of the Court held in those cases that the Act of 1878 was valid, notwithstanding that it changed in an important way the contract relations previously existing between the United States and the Union Pacific Railroad Company.

II

The petitioner contends that "The Government may not withdraw the right to sue in the case at bar, because such withdrawal impairs the obligation of plaintiff's war risk insurance contract" (reply brief, p. 3).

The three cases cited under this contention, on page 3 of the reply brief, have no bearing on the case at bar. In none of them was any government, except the City of Quincy, Illinois, involved, and in none of them was there suggested a withdrawal of the right to sue a sovereign. All three were suits on debts, by private parties, against private parties and a city.

The Contract Clause (Article I, Sec. 10) does not bind the United States. The Fifth Amendment does. But it is certainly no stricter than the Contract Clause, and it may be doubted if it is as strict. If, then, this Court has held that States, with outstanding valid contract rights againts them, and with statutes permitting their creditors to sue, may validly repeal those statutes, and stand upon their sovereign immunity from suit, without violation of the Contract Clause, it follows necessarily that the United States may do the same, without violation of the Fifth Amendment. This Court has so held, as to States, in four decisions. *Railroad Company* v. *Tennessee,* 101 U.S. 337; *Railroad Company* v. *Alabama,* 101 U.S. 832; *Baltzer* v. *North Carolina,*

161 U.S. 240; *Baltzer & Tanks* v. *North Carolina*, 161 U.S. 246. See also *In re Ayers*, 123 U.S. 443, 505. In the *Tennessee* case the obligation sued on was a debt of the Bank of Tennessee, guaranteed by the State. In the *Alabama* case it was a part of the State's "three percent fund." In the first *North Carolina* case it was a group of railroad aid bonds. In all four cases the States was suable, by statute, when the claims were acquired by the respective plaintiffs, and in the *Alabama* case this condition continued until after the suit was brought. The Alabama statute further made it the duty of the Comptroller, upon a judgment and a certificate by the Judge and the Clerk of Court that the recovery was just, "to issue his warrant for the amount." In each of the four cases the State withdrew permission to be sued before the plaintiff got a judgment, and in each of them this Court determined that it had that power, and that its action did not violate the Contract Clause.

The basis of these four decisions, that the judicial remedy provided did not contain provision for execution of the judgment and so might be validly withdrawn, is exactly applicable to suits against the United States on money claims. Under the Constitution, Article I, Section 9, no "money shall be drawn from the Treasury but in consequence of an appropriation made by law." Accordingly, the law provides for a report of judgments against the United States to Congress (Judicial Code, Sec.

143; U.S.C., Title 28, Sec. 248) and Congress appropriates to pay them. Congress sometimes does not pay them all (33 Stat. 422, "except the two judgments in favor of the Coca Cola Company"; 40 Stat. 378, "except the judgment in favor of the Louisville & Nashville Railroad Company"), and when it does not no court has power to make it. As Chief Justice Waite said, in denying the petition for rehearing in *Railroad Company* v. *Alabama*, 101 U.S. 832, 835:

> The case is precisely like that of a judgment in the Court of Claims against the United States. By the Constitution of the United States no "money shall be drawn from the treasury but in consequence of appropriations made by law." Art. 1, sec. 9. Hence the party who gets a judgment must wait until Congress makes an appropriation before his money can be had.

The four decisions noted cannot be distinguished from the present case, and they require an affirmance of the judgment.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1934.

U. S. GOVERNMENT PRINTING OFFICE, 1934

Sample CLERK'S COPY. 74067
144

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 861

SAM WILNER, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF MEYER WILNER, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 14, 1934.

CERTIORARI GRANTED APRIL 9, 1934

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 861

SAM WILNER, IN HIS OWN RIGHT AND AS ADMINISTRATOR OF THE ESTATE OF MEYER WILNER, DECEASED, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Record from D. C. U. S., Northern Illinois	1
Caption	1
Petition	2
Demurrer	7
Memorandum sustaining demurrer, Barnes, J.	8
Judgment	12
Petition for appeal	13
Affidavit of Sam Wilner	14
Assignments of error	15
Order allowing appeal	16
Stipulation as to transcript of record	16
Clerk's certificate	17
Citation and service	17
Clerk's certificate	19
Proceedings in U. S. C. C. A., Seventh Circuit	21
Caption	21
Opinion, Fitz-Henry, J.	21
Judgment	26
Stipulation as to transcript of record	27
Clerk's certificate	29
Order allowing certiorari	30

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 14, 1934.

—4858-C

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on 12th day of July, in the year of our Lord one thousand nine hundred and Thirty-Three, being one of the days of the regular July Term of said Court, begun Monday, the Third day of July, and of our Independence the 158th year.

Present:

Honorable John P. Barnes.

H. C. W. Laubenheimer, U. S. Marshal.

Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, Deceased,
vs.
United States of America.
} No. 42049.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Petition in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 28th day of April, 1933.

3 IN THE DISTRICT COURT OF THE UNITED STATES,

* * (Caption) * *

PETITION—Filed April 28, 1933.

To the District Court of the United States, for the Northern District of Illinois, Eastern Division:

The plaintiff complains of the above named defendant and for cause of action alleges:

1. That the plaintiff is a citizen of the United States of America and a resident of the said Northern District of Illinois, Eastern Division; that one Meyer Wilner died intestate on the 15th day of May, A. D. 1929, a resident of the City of Chicago, in the County of Cook and State of Illinois; that on the 20th day of May, A. D. 1929, the plaintiff was duly appointed administrator of the estate of said Meyer Wilner, deceased, and letters of administration were issued to him as such by the Probate Court of Cook County, Illinois, and he duly qualified as such administrator, and he brings into the court here the letters of administration

so granted to him, which gives sufficient evidence to the court here of the said grant of administration; that the said Meyer Wilner enlisted for military service in the United States Army on the 19th day of September, A. D. 1917, and was given an honorable discharge therefrom on the 31st day of March, A. D. 1919; and the plaintiff is
4 now a resident of Chicago, Illinois;

2. That while in active service under said enlistment, the said Meyer Wilner made application for a policy of War Risk Insurance in his behalf and said application was accepted by the defendant and a policy or certificate of War Risk Insurance was issued thereon, as the plaintiff is informed and believes, in the amount of Ten Thousand Dollars, and thereafter there was deducted from the monthly pay of the said Meyer Wilner from time to time the usual premiums, to-wit: Six Dollars and Seventy Cents per month in full payment of the money due from the said Meyer Wilner under the terms of the said policy or certificate, by the terms of which policy or certificate the defendant agreed to pay to the said Meyer Wilner the sum of, to-wit: Fifty-seven Dollars and Fifty Cents per month in the event of permanent total disability incurred during the life of the said insurance contract and in the event of his death while such disability continued to exist and before a total of two hundred forty of such monthly installments last mentioned had become due and payable, then to pay to his brother, the plaintiff Sam Wilner, in his own right, as beneficiary, the portion of such total of two hundred forty of such monthly installments last mentioned that had not become due and payable during the lifetime of the said Meyer Wilner; which policy or certificate is not in the possession of the plaintiff and the plaintiff upon diligent search and inquiry has been unable to find the same, and the plaintiff is unable to set forth any further particulars as to the contents thereof, but the same, or a copy thereof, is in the possession of the defendant, and the contents thereof are well known to the defendant;

3. That during the life of the said insurance contract and while the said Meyer Wilner was in the military service of the United States as aforesaid, the said Meyer Wil-

ner became totally and permanently disabled as a result of the following diseases, ailments and injuries, to-wit: Shrapnel wound in left leg; loss of left leg; gunshot wound in left side; gunshot wound in left hand; gunshot wound in abdomen; gunshot wound in left writ; general weakness; and general disability;

4. That by reason of the matters and things aforesaid, the said Meyer Wilner became and was totally and permanently disabled on, to-wit: the 15th day of April, A. D. 1919, and became entitled to receive from the defendant under the terms of the said contract of insurance, the sum of Fifty-seven Dollars and Fifty Cents per months for each month thereafter during his lifetime, and the plaintiff Sam Wilner in his own right as beneficiary became entitled to receive from the defendant under the terms of the said contract of insurance, two hundred forty monthly installments of Fifty-seven Dollars and Fifty Cents each, less the number thereof that so became due and payable during the lifetime of the said Meyer Wilner, and the plaintiff Sam Wilner as Administrator of the Estate of Meyer Wilner, deceased, became entitled to receive from the defendant under the terms of the said contract of insurance, the said installments of Fifty-seven Dollars and Fifty Cents each that so became due and payable to the said Meyer Wilner in his lifetime;

5. That the said Meyer Wilner made due proof of said disability to the defendant and demanded payment of the aforesaid amounts, and the plaintiff made due proof of said disability and death to the defendant and demanded payment of the aforesaid amounts, but that the defendant and its agent, the United States Veterans' Bureau, the Veterans Administration and the Administrator of Veterans Affairs allowed said claims to go for an unreasonable time after the making of the same to the said United States Veterans' Bureau, to-wit: from the 13th day of November, A. D. 1928, as to the said claim of the said Meyer Wilner, and from the 17th day of May, A. D. 1929, as to the said claim of the plaintiff, to the 7th day of April, A. D. 1933, without an ultimate decision thereon; nevertheless, the said defendant and its said agent, the Administrator of Veterans Affairs, have disagreed with the plain-

tiff as to his claim for said insurance money and
6 have wholly failed and refused to pay said sums of money, or either thereof, or any part thereof; that on, to-wit: the 22nd day of March, A. D. 1933, the plaintiff wrote to the said Administrator of Veterans Affairs and demanded a final decision on appeal on said claim and thereafter the said Administrator of Veterans Affairs, on, to-wit: the 7th day of April, A. D. 1933, acting through J. O'C. Roberts, solicitor for the Veterans Administration, his duly authorized representative in that behalf, notified the plaintiff in writing that in view of Section 17 of an Act to Maintain the Credit of the United States Government, Public No. 2, Seventy-third Congress, approved by the President at noon on March 20, 1933, the Administration was without authority to take any action on said claim, which written notification was signed "For the Administrator, J. O'C. Roberts, Solicitor," and thereby the said Administrator of Veterans Affairs denied the plaintiff's said claim and caused a disagreement to exist between the said plaintiff and the said Administrator of Veterans Affairs with respect thereto;

6. And the plaintiff further alleges that the said Act to Maintain the Credit of the United States Government, and especially the portions thereof which purport to affect the said claim of the plaintiff, is and are unconstitutional, null and void for the reason that the same attempts to delegate to an executive official legislative powers, contrary to Section 1 of Article I of the Constitution of the United States, providing that all legislative powers in said Constitution granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives, and for the further reason that in taking away from the plaintiff his rights under the said contract of insurance first hereinbefore mentioned, in order to maintain the credit of the United States Government, without making any compensation to the plaintiff therefor, the said Act to Maintain the Credit of the United States Government and the said portions thereof hereinbefore
7 referred to, deprives the plaintiff of property without due process of law and takes from the plaintiff his private property for public use without just compensation,

contrary to the provisions of Article V of the Amendments to the Constitution of the United States, providing that no person shall be deprived of property without due process of law, nor shall private property be taken for public use, without just compensation.

Wherefore, the plaintiff prays judgment against the defendant in the sum of Seven Thousand Four Hundred Seventy-five Dollars in favor of the plaintiff as Administrator as aforesaid, being the amount so due at Fifty-seven Dollars and Fifty Cents per month from the 15th day of April, A. D. 1919, to the 4th day of May, A. D. 1929, inclusive, and in the further sum of Two Thousand Seven Hundred Two Dollars and Fifty Cents in favor of the plaintiff in his own right, being the amount so due at Fifty-seven Dollars and Fifty Cents per month since the death of the said Meyer Wilner, and for the sum of Fifty-seven Dollars and Fifty Cents per month for each and every month thereafter until there has been paid to the plaintiff in his own right a total of one hundred ten of said monthly installments in addition to the money so due him as such administrator.

SAM WILNER,
In his own right and as Administrator of the Estate of Meyer Wilner, deceased, Plaintiff.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

State of Illinois } ss.
County of Cook }

SAM WILNER, being first duly sworn, on his oath says that he is the plaintiff whose name is subscribed to the foregoing petition; that he has read the same and knows the contents thereof; that the matters and things therein stated are true in substance and in fact; and further affiant sayeth not.

SAM WILNER.

Subscribed and sworn to before me this 26th day of April, A. D. 1933.

DENNIS F. PARSONS,
Notary Public.

(Notarial Seal)

7½ And on, to wit, the 9th day of May, 1933, came the Defendant by its attorney and filed in the Clerk's office of said Court a certain Demurrer in words and figures following, to wit:

8 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA,

(Caption)

DEMURRER—Filed May 9, 1933.

And the defendant, United States of America, by Dwight H. Green, its attorney for the Northern District of Illinois, comes and defends, etc., when, etc., and says that the petition, and each and every allegation thereof and the matters therein contained, in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his action aforesaid, and that it, the defendant, is not bound by law to answer the same; and this it is ready to verify.

Wherefore, for want of authority in law the defendant prays judgment and that the plaintiff may be barred from maintaining the aforesaid action.

DWIGHT H. GREEN,
United States Attorney.

State of Illinois }
County of Cook } ss.

FRANCIS J. KENNEDY, being first duly sworn upon his oath deposes and says that he is an Assistant United States Attorney assigned to the Northern District of Illinois, Eastern Division; that he is one of the attorneys for the defendant in the above entitled cause; that he verily believes that the foregoing Demurrer is well-founded in point of law and is not interposed for the purpose of delay.

FRANCIS J. KENNEDY.

Subscribed and sworn to before me this ..... day of May, A. D. 1933.

.....
Notary Public.

8½ And on to wit, the 10th day of July, 1933 being one of the days of the regular July term of said Court in the record of proceedings thereof, in said entitled cause before Honorable John P. Barnes, District Judge, appears the following entry, to wit:

9 IN THE DISTRICT COURT OF THE UNITED STATES,

* * (Caption) * *

MEMORANDUM—Filed July 10, 1933.

This cause comes on to be heard upon the demurrer of the defendant to plaintiff's petition.

The petition alleges that the plaintiff is, and that his decedent was, a resident of this district; that plaintiff's decedent enlisted for miliary service on September 19, 1917, and was discharged on March 31, 1919; that plaintiff's decedent, while in active service, made application for a policy of war risk insurance, and that a policy of war risk insurance was issued to him in the amount of $10,000; that while said contract of insurance was in force, and while plaintiff's decedent was in the miliary service, plaintiff's decedent became permanently and totally disabled on August 4, 1918; that plaintiff's decedent made proof of said disability and demanded payment of installments under the insurance contract, but that the defendant and its agent, the United States Veterans Bureau, the Veterans Administration and the Administrator of Veterans Affairs, allowed said claims to go for an unreasonable time after the making of the same to the United States Veterans Bureau, to-wit, from November 15, 1928, as to the claim of plaintiff's decedent, and from May 17, 1929, as to plaintiff's claim, to April 7, 1933, without an ultimate decision thereon, but, nevertheless the defendant and its agent, the Administrator of Veterans Affairs, have disagreed with the plaintiff; that the Act of Congress of the United States, entitled "An Act to Maintain the Credit of the United States Government," approved March 20, 1933, is uncon-

stitutional, for the reason that it attempts to delegate
10 to an executive legislative powers, contrary to Section 1 of Article I of the Constitution, and for the further reason that it takes away from the plaintiff his rights under the said contract of insurance in order to maintain the credit of the United States, without making any compensation, and deprives the plaintiff of property without due process of law, and takes from the plaintiff his private property for public use without just compensation, contrary to the provisions of Article V of the amendments to the Constitution.

As the court views this case, it is unnecessary to consider a number of the questions raised and argued by counsel.

Jurisdiction was conferred upon this court to entertain an action on a policy of war risk insurance in the event of disagreement as to a claim thereon between the Bureau and any beneficiary or beneficiaries thereunder on October 6, 1917 (40 U. S. Stats. L., p. 410). That jurisdiction has been confirmed and continued by various amendments, which have been adopted and approved from time to time since, until on March 20, 1933, there was approved by the President of the United States an act entitled "An Act to maintain the credit of the United States Government," wherein it is provided:

> "SEC. 17. * * * and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * *. That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *."

The action at bar was commenced on April 28, 1933. Accordingly, at the time this action was started, the jurisdiction of this court to adjudicate on claims of "yearly renewable term insurance" (and such is the insurance in

question in the case at bar) had ceased to exist, assuming, of course, that the Act of March 20, 1933, is not unconstitutional.

11 Counsel for plaintiff argues that the act is unconstitutional because it delegates to the executive legislative powers. The court is not persuaded that the act is unconstitutional on this ground, and therefore holds that, so far as this point is concerned, it is constitutional.

Perhaps that is all that is necessary to be said. The jurisdiction of this court which formerly existed has ceased to exist. But the court is impelled to make the following observations.

The plaintiff is, and his decedent was, a resident of the State of Illinois. Prior to May 29, 1928, there was no applicable Federal statute of limitations. *Sligh* v. *U. S.*, 277 U. S. 582. Accordingly, the statute of limitations of the State of Illinois was applicable to the cause of action of plaintiff and of plaintiff's decedent. The cause of action being one on a written contract, the Illinois statute required that the action be commenced thereon within ten years next after the cause of action accrued. The petition alleges that plaintiff's decedent became totally and permanently disabled on August 4, 1918. Accordingly, the cause of action arose on that date. (*U. S.* v. *Sligh* (C. C. A. 9), 24 Fed. (2d) 636). The petition does not allege when plaintiff's decedent made proof of his disability, or when the plaintiff made proof of said disability, but does allege that the defendant and its agencies delayed for an unreasonable time in passing upon said claims, to-wit, from November 15, 1928, as to the claim of plaintiff's decedent; and from May 17, 1929, as to the claim of plaintiff. The petition being most strongly construed against the pleader, it will be assumed that plaintiff's decedent did not make claim until November 15, 1928, and plaintiff did not make claim until May 17, 1929,—in each case more than ten years after the cause of action arose.

12 The first applicable Federal statute of limitations was approved May 29, 1928. It provided that (45 U. S. Stats. L., p. 964):

"No suit shall be allowed under this section unless the same shall have been brought within six years

after the right accrued for which the claim is made, or within one year from the date of the approval of this amendatory Act, whichever is the later date: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * * * * No State or other statute of limitations shall be applicable to suits filed under this section."

By an act approved July 3, 1930, the Federal statute of limitations was amended to read as follows: (46 U. S. Stats. L., p. 992):

"No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director." * * * No State or other statute of limitations shall be applicable to suits filed under this section."

These provisions have, however, been repealed by the act of March 20, 1933.

The court is familiar with the doctrine that the power to enact statutes of limitation is subject to the fundamental condition that a reasonable time shall be allowed for the exercise of the right of action, whether existing or prospective, after it comes within the prospective or present operation of the statute and before the bar becomes effective,

but the court is of the opinion that if the Act of March 20, 1933, be regarded only as an act repealing a statute of limitations favorable to the plaintiff, yet the foregoing general principle has no application, and should not have application, for the reason that the cause of action was barred under the then applicable statute of limitations (that of Illinois) before the statute of limitations more favorable to the plaintiff became the law of the land.

13 The court has not considered, and, as above indicated, has not found it necessary to consider, the question as to whether or not the plaintiff has a contract or a right, as distinguished from a remedy.

For the reasons above indicated, the defendant's demurrer will be sustained.

The court has been helped in arriving at the conclusions above expressed by the opinion of Judge Taylor, in the case of *Grubb* v. *U. S.*, in the District Court of the United States for the Eastern District of Tennessee, filed May 23, 1933.

Appropriate orders may be made at the opening of court on Wednesday, July 12, 1933, without any other or further notice than this.

BARNES
Judge.

14 And afterwards, to wit, on the 12th day of July, 1933, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

Wednesday, July 12, 1933.

Present: Honorable John P. Barnes, Judge of said Court.

On motion of plaintiff's attorney

It Is Ordered that leave be and the same is hereby given the plaintiff to amend instanter the petition on its face; demurrer of defendant to stand as demurrer to petition as

amended, thereupon this cause coming on to be heard upon the defendant's demurrer to the petitioner's petition as amended after arguments of counsel and due deliberation by the Court said demurrer is sustained, whereupon, the plaintiff elects to stand by his petition as amended, whereupon, it is ordered by the Court that this suit be and the same is hereby dismissed for want of jurisdiction at plaintiff's costs, therefore, it is considered by the Court that the defendant do have and recover of and from the petitioner its costs and charges in this behalf expended to be paid in due course of administration to which ruling of the Court the petitioner by his attorney duly excepts.

16 And on, to wit, the 13th day of July, 1933, came the Plaintiff by his attorney and filed in the Clerk's office of said Court a certain Petition for Appeal in words and figures following, to wit:

17 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

PETITION FOR APPEAL—Filed July 13, 1933.

To the Honorable John P. Barnes, Judge of Said Court:

And now comes Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased, the plaintiff in the above entitled cause, by Edward H. S. Martin, his attorney, and feeling himself aggrieved by the final judgment of this court entered against him in favor of the United States of America, defendant, dismissing the said suit for want of jurisdiction on the 12th day of July, A. D. 1933, hereby prays that an appeal may be allowed to him therefrom to the United States Circuit Court of Appeals for the Seventh Circuit, and in connection with his petition herewith presents his assignment of errors.

And the said plaintiff further prays that he may be allowed to prosecute the said appeal in forma pauperis for the reasons set forth in the affidavit herewith submitted.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

18 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

State of Illinois }
County of Cook } ss.

SAM WILNER, being first duly sworn, on his oath says that he is a citizen of the United States of America; that he is the plaintiff in the above entitled cause and the appellant mentioned in the foregoing petition for appeal and in the assignment of errors herewith submitted; that this affiant is not now employed and is unable to obtain employment and is able to exist only with the aid of relief furnished by the Illinois Emergency Relief Fund, as a matter of charity; that the only asset of the estate of said deceased is the cause of action involved in the above entitled cause; that the said Meyer Wilner, deceased, died intestate and this affiant and all of the heirs-at-law of said Meyer Wilner, deceased, have no money or property except necessary wearing apparel and necessary household goods; that because of their poverty and the absence of assets of said estate and the fact that this affiant and the said heirs-at-law have no money or property upon which money can be raised, this affiant and the said heirs-at-law are unable to pay the costs of such appeal or to give security for the same and that he verily believes he is entitled to the redress he seeks by such appeal, for the reasons set forth in the assignment of errors herewith submitted,
19 and therefore prays that he may be given leave to prosecute such appeal without the payment of costs or giving of security therefor; and further affiant sayeth not.

SAM WILNER.

Subscribed and sworn to before me this 13th day of July, A. D. 1933.

DENNIS F. PARSONS,
Notary Public.

(Notarial Seal)

20 And on, to wit, the 13th day of July, 1933, came the Plaintiff by his attorney and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

21 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

ASSIGNMENT OF ERRORS—Filed July 13, 1933.

And now comes the appellant, Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased, by Edward H. S. Martin, his attorney, and in connection with his petition for an appeal in the above entitled cause, says that in the record and proceedings and in the final judgment aforesaid, manifest error has intervened to the prejudice of the appellant, to-wit:

1. The said District Court error in sustaining the demurrer to the petition in the above entitled cause.
2. The said District Court erred in dismissing the said suit for want of jurisdiction.
3. The judgment of said District Court dismissing the said suit is contrary to law.
4. The said District Court erred in awarding costs against the plaintiff.

By Reason Whereof, the appellant prays that the judgment aforesaid may be reversed.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.

22 And on to wit, the 13th day of July, 1933 being one of the days of the regular July term of said Court in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

23 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

It Is Hereby Ordered that the plaintiff be, and hereby is, allowed an appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered on the 12th day of July, A. D. 1933, in this cause and that he be, and hereby is, given leave to prosecute such appeal without the payment of costs or giving security therefor.

BARNES,
District Judge.

24 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

STIPULATION AS TO TRANSCRIPT.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled cause that the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in making up the transcript of the record to be submitted to the United States Circuit Court of Appeals for the Seventh Circuit on appeal in said cause, may include in such transcript the following records and files in said cause, using originals where permitted by law and copies otherwise, to-wit:

1. The plaintiff's petition filed in said cause.
2. The defendant's demurrer thereto.
3. The opinion of the court on said demurrer.
4. The final judgment in said cause and all orders entered July 12, 1933.
5. The plaintiff's petition for appeal and affidavit attached thereto.
6. The assignment of errors.
7. The order allowing an appeal.

8. This stipulation.
9. The citation and proof of service thereof.

Dated July 13, 1933.

EDWARD H. S. MARTIN,
Attorney for Plaintiff.
DWIGHT H. GREEN,
by FJK
United States Attorney,
Attorney for Appellee.

25 Northern District of Illinois } ss:
Eastern Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased *vs.* United States of America No. 42049 as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 14th day of July, A. D. 1933.

CHARLES M. BATES,
Clerk.

(Seal)

26 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption)

CITATION—Filed July 13, 1933.

To United States of America—Greeting:

You Are Hereby Cited and Admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, Illinois, thirty days

from and after the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, from the final judgment filed and entered on the 12th day of July, A. D. 1933, in that certain suit, being No. 42049, wherein Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner, deceased, is plaintiff and United States of America is defendant, and wherein the said plaintiff is appellant and you, the said United States of America, is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said order allowing said appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable John P. Barnes, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, this 13th day of July, in the year of our Lord One Thousand Nine Hundred and Thirty-three.

JOHN P. BARNES,
Judge.

27 United States of America
Northern District of Illinois } ss.
Eastern Division

Due service of the foregoing citation upon United States of America, appellee, is hereby acknowledged this 13th day of July, A. D. 1933.

DWIGHT H. GREEN,
Per F. J. K.
United States Attorney, Attorney for Appellee.

(File endorsement omitted.)

28 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 18, inclusive, contain a true copy of the transcript of record of the District Court of the United States for the Northern District of Illinois, Eastern Division, filed in this Court on August 8, 1933, on which the following entitled cause was heard and determined:

Sam Wilner in his own right and as Administrator of the Estate of Meyer Wilner,

Appellant,

vs.

The United States of America,

Appellee,

No. 4898, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of March, A. D. 1934.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

29 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the third day of October, 1933, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Three, and of our Independence the One Hundred and Fifty-Eighth.

Sam Wilner, In his own right, and as Administrator of the Estate of Meyer Wilner, Deceased,
5050 *vs.*
The United States of America

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit: On the twelfth day of January, 1934, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

30-32 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption) * *

OPINION—Filed January 12, 1934.

Before ALSCHULER, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This is an appeal from a judgment dismissing appellant's suit for want of jurisdiction and for costs, upon sustaining appellee's demurrer to appellant's petition. Suit was brought April 28, 1933, under an alleged disagreement on April 7, 1933, with the Administrator of Veterans Affairs, to recover permanent disability and death benefits under a War Risk Insurance Certificate issued to the soldier Meyer Wilner.

The petition charges that the soldier died intestate May 15, 1929, at Chicago, Cook County, Illinois. Appellant was appointed administrator of his estate May 20, 1929, and qualified. The soldier enlisted in the military service September 19, 1917, and was honorably discharged March 31, 1919; while in the service the insurance policy in question in the sum of $10,000 was granted him; all premiums on it were deducted from the soldier's pay; appellant, a brother, was named as beneficiary. It was also alleged that the soldier became totally and permanently disabled April 15, 1919. Proof of disability was made by the soldier and appellant made due proof of death to appellee and demanded payment. The Veterans Bureau, the Veterans Administration and the Administrator of Veterans Affairs allowed the claim to go for an unreasonable time after making proofs to the Veterans Bureau, to-wit: from November 15, 1928, as to the claim of decedent, and from May 17, 1929, as to the claim of petitioner, to April 17, 1933, without an ultimate decision thereon.

The alleged disagreement is with the Administrator of Veterans Affairs as to appellant's claims, in having wholly failed and refused to pay the said money or any thereof, reciting the particulars as to the denial of said claims, made in writing April 7, 1933, on the purported authority of Section 17 of an Act entitled, "An Act to Maintain the Credit of the United States Government," Public No. 2, 73rd Congress, approved March 20, 1933, charging that thereby a disagreement existed between appellant and the Administrator of Veterans Affairs.

The petition charges that the act referred to is unconstitutional, being an attempt to delegate legislative powers to an executive officer, contrary to Section 1, Article I, of the Constitution; also, for the reason that it amounts to taking from appellant his rights under the contract of insurance without making compensation therefor, and that the act referred to deprives appellant of property without due process of law and takes from him his private property for public use without just compensation, in violation of the 5th Amendment.

The date originally charged when the soldier became totally and permanently disabled was August 18, 1918; by amendment the date was changed to April 15, 1919, which brought the cause of action within the ten year statute of limitations in Illinois.

Appellant has raised many interesting constitutional questions in his arguments and briefs. Section 17 of An Act to

Maintain the Credit of the United States Government (Title 38, § 717, USCA) "repeals all public laws granting * * * compensation and allowances, * * * to veterans and dependents of veterans of * * * the World War * * *."

It also contains the following provision:

> "and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * *. The Administrator of Veterans Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under the above referred to laws and where a person is found entitled under this chapter, to authorize payment or allowance of benefits in accordance with the provisions of this chapter. * * *"

All cases where suit has been commenced prior to the passage of the act, or where payment has been allowed and commenced, or where a judgment has been rendered by a court of competent jurisdiction on a contract for yearly renewable insurance, or which may hereafter be rendered in any such suit now pending, under contracts for yearly renewable term insurance, are excepted from the operation of the above provisions.

Because the act permits the Administrator to re-examine the cases and to make allowances according to regulations prescribed by the President, it is claimed there is an unwarrantable delegation of legislative power.

The material section, so far as the jurisdiction of this Court is concerned, is Section 5 (Title 38, § 705 USCA), which makes all decisions of the Administrator of Veterans Affairs, under the provisions of the act or regulations issued pursuant thereto, final and conclusive on all questions of law and fact "and no other official or Court of the United States shall have jurisdiction to review by amendment or otherwise any such decision."

The United States Circuit Court of Appeals for the 5th Circuit very recently had almost the precise questions here involved before it in *Margaret Shea Lynch* v. *United States*. In an opinion filed November 3, 1933, (not yet reported) the Court said:

> "We need not discuss in detail the interesting questions raised by appellant. It is elementary that the United States may not be sued without her consent. Section 5 of the Act of March 20, 1933, is broad enough to deprive the District Court of jurisdiction whether vested by the provisions of the Tucker Act (28 USCA 41, par.

20) or under the provisions of the War Risk Insurance Act (38 USCA 445). Conceding that the policy of insurance is a contract, it was subject to any provisions of law subsequently enacted by Congress and appellant's rights were not impaired thereby. *White* v. *United States*, 270 U. S. 175."

We believe the Circuit Court of Appeals reached the proper decision in the Lynch case, *supra*, and that its conclusions are sound. There is no unlawful taking of property without due process of law for the reason there is no vested right conferred upon a beneficiary in a war risk insurance policy. *White* v. *United States*, 270 U. S. 175.

It is well settled that a sovereign may, by legislation, abrogate the right previously granted to sue it. *Munn* v. *Illinois*, 94 U. S. 113; s. c. 69 Ill. 80; *Orr* v. *Allen*, 248 U. S. 35.

Section 17 of the Act of March 20, 1933, deals with claims of the same general character as those which are now cognizable in the United States Court of Claims and the United States Court of Customs Appeals; that is, they are of such a character as the Congress might for consideration and disposition "confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States." *Ex Parte Bakelite Corporation*, 279 U. S. 438; *Williams* v. *United States*, 289 U. S. 553, 579; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272.

Under these same authorities Section 17 of the Act of March 20, 1933, does not violate Section 1, Article I of the Constitution of the United States as an unwarranted delegation of legislative power to the executive.

For many years following the Civil War and the Mexican War the allowance of pensions was handled entirely by the Congress itself. Many thousands of special acts were passed granting relief to specific veterans or their widows.

In *United States* v. *Ferreira*, 13 How. 40, 48, the United States Supreme Court was referring to an Act of Congress passed in pursuance of a treaty directing that the judges of the territorial courts of Florida should examine and adjudge certain claims against the United States for losses suffered as the result of military operations. The statute gave the right to review to the Secretary of the Treasury. The Court held that the power conferred, although judicial in nature, was nothing more than the power ordinarily given by law to

a commissioner appointed to adjust claims under a treaty, and held that the statute was not unconstitutional because it conferred the power to review upon the Secretary of the Treasury.

In *Williams* v. *United States, supra,* the Supreme Court said:

> "And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article."

It is clear that when Congress, in the Act of March 20, 1933, with reference to claims of the character here involved, after giving the Administrator of Veterans Affairs the power of final and conclusive decision on all questions of law and fact, said: "And no other official or court of the United States shall have jurisdiction to review by amendment or otherwise any such decision" (§ 5, being Title 38, § 705 USCA), no provision of the Constitution was infringed.

While the Act of March 20, 1933, involves a substantial reversal of policy by the Congress upon the same subject matter, yet the advisability or desirability of such action is a matter that was addressed to the legislative discretion of the Congress and not to the Courts.

Any benefits to which appellant may be entitled under the law are now within the discretion of the President and the Administrator of Veterans Affairs. All jurisdiction to hear and determine such matters has been withdrawn from the Courts of the United States. *Stanley* v. *Schwalby,* 162 U. S. 255; *Eastern Transportation Co.* v. *United States,* 272 U. S. 675; *The Collector* v. *Hubbard,* 12 Wall. 1. In the latter case the Court said:

> "A party cannot have any vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise."

The Court below properly dismissed the suit for want of jurisdiction. It went farther, however, and gave judgment against appellant for costs. It was error to tax costs against appellant, where the Court finds it has no jurisdiction.

Inglee v. *Coolidge*, 2 Wheat. 363; *Mayor* v. *Cooper*, 6 Wall. 247; *Hornthall* v. *Collector*, 9 Wall. 560; *Citizens' Bank of Louisiana* v. *Cannon, Sheriff, et al.*, 164 U. S. 319; *Conley* v. *Ballinger*, 216 U. S. 84, 30 S. Ct. 224.

The judgment will be reversed and the cause remanded, with directions to enter judgment dismissing appellant's petition, without costs.

33 And on the same day, to-wit: On the twelfth day of January, 1934, the following further proceedings were had and entered of record, to-wit:

Friday, January 12, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

(Caption)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to enter judgment dismissing appellant's petition without costs.

34 And afterwards, to-wit: On the nineteenth day of February, 1934, there was filed in the office of the Clerk of this court a stipulated praecipe for record, which said stipulated praecipe for record is in the words and figures following, to-wit:

35 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption)

STIPULATION—Filed February 19, 1934.

It Is Hereby Stipulated and Agreed by and between the parties to the above entitled cause, that in making up the transcript of the record for use on petition for certiorari in the Supreme Court of the said United States in the above entitled cause, the Clerk of the said United States Circuit Court of Appeals may omit from the transcript of the record of said United States Circuit Court of Appeals in said cause, all matters except the following:

1. Printed transcript of the record of said District Court.
2. Opinion filed January 12, 1934.
3. Judgment entered January 12, 1934, reversing judgment of District Court.
4. This stipulation.

EDWARD H. S. MARTIN,
Attorney for Appellant.
DWIGHT H. GREEN,
United States Attorney, Attorney for Appellee.

Chicago, Illinois,
February 19, 1934.

36 UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 21 to 27, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the stipulated praecipe, filed on the nineteenth day of February, 1934, in the case of

Sam Wilner, In his own right, and as Administrator of the Estate of Meyer Wilner, Deceased,

Appellant,

vs.

The United States of America,

Appellee,

No. 5050, October Term, 1933, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 1st day of March, A. D. 1934.

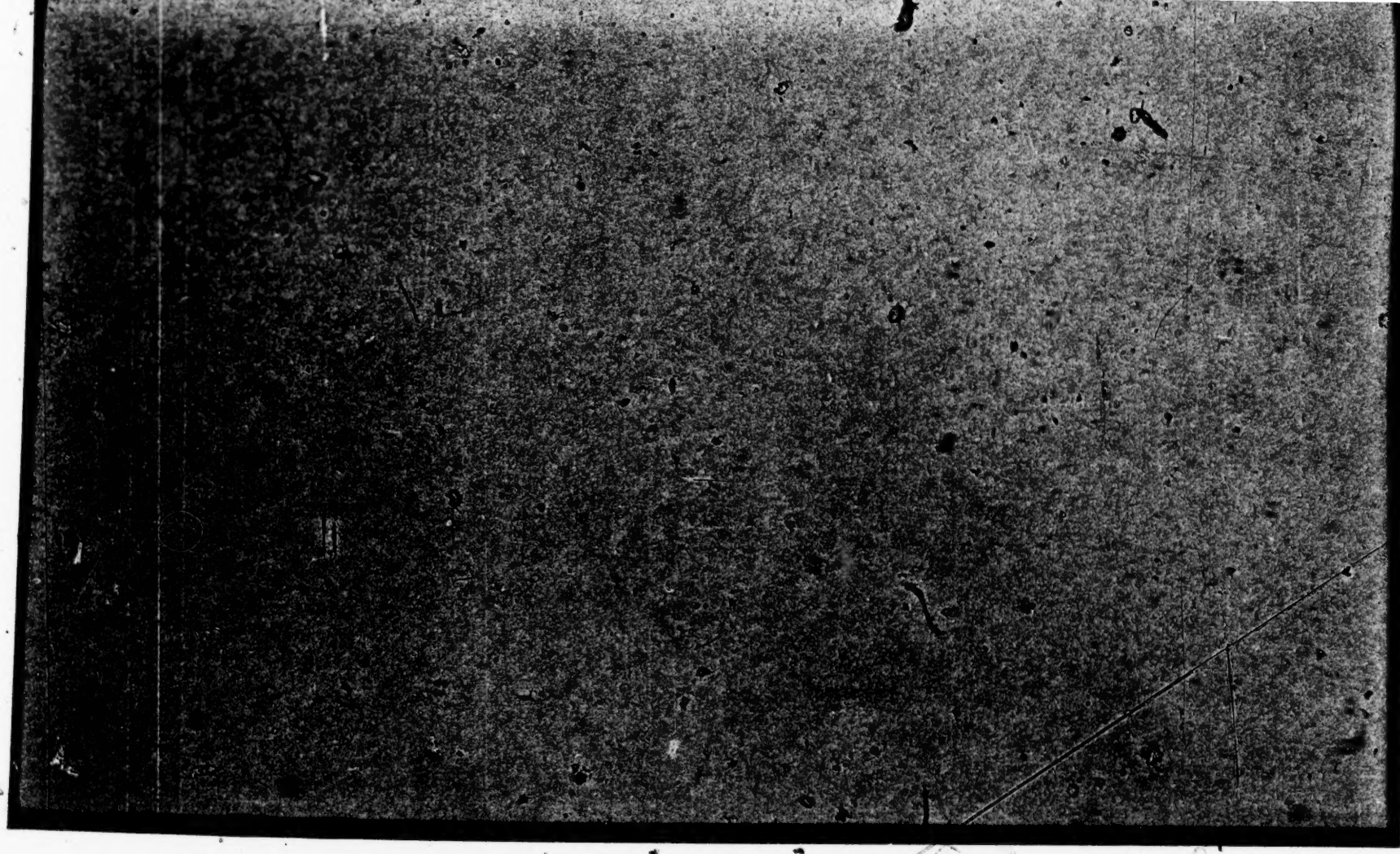
FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 9, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



FILE COPY

MAR 14 193

CHARLES ELMORE C
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No. 861

SAM WILNER in his own right and as Administrator of the Estate of Meyer Wilner, deceased,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDWARD H. S. MARTIN,
10 S. LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago--FRAnklin 5501

INDEX.

SUBJECT INDEX.

	PAGE
Petition	1
Prayer for writ	1
Summary statement of matter involved	2
Reasons relied on for allowance of writ	3
Statutes involved	5
Brief	6
Opinion of court below	6
Jurisdiction	6
Statement of the case	6
Specification of error	6
Argument	7
Case affects thousands of veterans and many others	7
Vested right exists	7
Reserved powers do not authorize destruction of all contract rights	8
Economy Act confiscates insurance and does not merely withdraw consent to suit	8
White v. U. S., distinguished	9
Economy Act violates 5th Amendment	10
Emergency does not nullify 5th Amendment	11
Legal Tender Cases not controlling	11
Economy Act cannot stand as mere withdrawal of consent to suit	12
Statute of limitations not avaliable as defense	13
Unconstitutional delegation of legislative powers	14
Petitioner's right to question such delegation	14

PAGE

Economy Act preserves no administrative remedy on war risk insurance 14

Congress may not grant unlimited discretion, nor delegate legislative powers 15

Such delegation appears in Economy Act 15

Combination of legislative and executive powers in same person despotic and destructive of free government 16

Conclusion 17

Appendix 19

Economy Act, various sections 19

World War Veterans' Act 21

TABLE OF CASES CITED.

Brooks-S. Corp. v. U. S., 265 U. S. 106 10

Buttfield v. Stranahan, 192 U. S. 470 ..... 4, 15

Butts v. Mer. T. Co., 230 U. S. 126 ..... 4, 12, 14

Cincinnati v. L. & N. R. Co., 223 U. S. 390 10

Close v. Glenwood Cemetery, 107 U. S. 466 ..... 4, 8

C., M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491 ..... 4, 8

Collins v. San. Dist., 270 Ill. 108 13

Coombes v. Getz, 285 U. S. 434 ..... 4, 8

Dorchy v. Kansas, 264 U. S. 286 ..... 4, 12, 14

Employers' Liab. Cases, 270 U. S. 463 ..... 4, 12, 14

Ex parte Milligan, 4 Wall. 2 11

Field v. Clark, 143 U. S. 649 ..... 4, 15

Fletcher v. Peck, 10 U. S. 87 11

Harris v. U. S., 5 F. Supp. 368 ..... 12, 13

Hepburn v. Griswold, 75 U. S. 603 11

Highland v. Russell C. Co., 279 U. S. 253 11

Holyoke Co. v. Lyman, 82 U. S. 500 ..... 4, 8

Home B. & L. Assn. v. Blaisdell, 54 S. Ct. Rep. 231 11

Hurtado v. California, 110 U. S. 516 10

I. C. C. v. Goodrich T. Co., 224 U. S. 194 ..... 4, 15

PAGE

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149 15
Legal Tender Cases, 79 U. S. 457 ..... 11, 12
Lloyd v. Sup. L. K. P., 98 F. 66 8
Louisville B. Co. v. U. S., 242 U. S. 409 ..... 4, 15
Lynch v. U. S., 67 F. (2d) 490 13
Miller v. State, 82 U. S. 478 ..... 4, 8
Monongahela N. Co. v. U. S., 148 U. S. 312 10
Newhall v. Sup. C. A. L. of H., 181 Mass. 111 8
O'Donoghue v. U. S., 289 U. S. 516 17
O'Neill v. Sup. C. A. L. of H., 70 N. J. L. 410 8
People v. McBride, 234 Ill. 146 ..... 12, 14
Phelps v. U. S., 274 U. S. 341 11
Pumpelly v. Green Bay Co., 13 Wall. 166 ..... 10, 12
Russian V. Fleet v. U. S., 282 U. S. 481 10
Sage v. Baldwin, 55 F. (2d) 968 ..... 12, 14
Shields v. Ohio, 95 U. S. 319 8
Sinking Fund Cases, 99 U. S. 700 ..... 4, 8
So. Ry. Co. v. Con. F. Co., 203 Ky. 441 11
Stanislaus County v. San. J. & K. R. C. & I. Co., 192 U. S. 201 ..... 4, 8
State v. Cumberland Club, 136 Tenn. 84 ..... 12, 14
Stearns v. Minnesota, 179 U. S. 223 ..... 4, 8
T., P. & W. Ry. Co. v. McClannon, 41 Ill. 238 13
U. S. v. Chi. etc. R. Co., 282 U. S. 311 ..... 4, 10, 15
U. S. v. Cohen G. Co., 255 U. S. 81 ..... 4, 11, 15
U. S. v. Cress, 243 U. S. 316 ..... 10, 12
U. S. v. Lynah, 188 U. S. 445 ..... 10, 12
U. S. v. Shreveport G. & E. Co., 287 U. S. 77 ..... 4, 15
U. S. v. Welch, 217 U. S. 333 10
Utah P. & L. Co. v. Pfort, 286 U. S. 165 ..... 4, 12, 14
Wall v. C. & O. R. Co., 200 Ill. 66 13
White v. U. S., 270 U. S. 175 ..... 8, 9
Wilson v. New, 243 U. S. 332 11

PAGE

TABLE OF STATUTES AND TEXT BOOKS CITED.

Am. Bar Assn. Journ., v. 19, No. 9, Sept., 1933, p. 493 ... 11
Am. Bar Assn. Jour., v. 19, No. 10, Oct., 1933, p. 587 ... 17
Beck, Future of the Constitution, 19 Am. Bar. Assn. Jour. 493 ... 11
Economy Act, vorious sections ... 2, 3, 5, 7, 9, 14, 15, 19
Farewell Address, 12 Writings of Washington 226 ... 17
Federalist, No. 44, p. 351, No. 47, p. 373, No. 48, p. 385 17
Flander's Lives and Times of the Chief Justices, v. 1, p. 256 ... 12
Jay, John, 5 Journals of Cong. 351 ... 12
Jefferson, Notes on the State of Virginia, 195. The Federalist, No. 48, p. 385 ... 17
Journals of Cong., v. 5, p. 351 ... 12
Judicial Code, Sec. 240 (a) ... 6
Madison, James, The Federalist, No. 44, p. 351, No. 47, p. 373 ... 17
McCarran, Growth of Federal Executive Power, 19 Am. Bar Assn. Jour., No. 10, Oct., 1933, p. 587 ... 17
Washington's Farewell Address, 12 Writing of Washington 226 ... 17
Webster, Daniel, Writings and Speeches of, v. 2, p. 107, v. 14, p. 362 ... 17
World War Veterans' Act ... 2, 5, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No.

SAM WILNER in his own right and as Administrator of the Estate of Meyer Wilner, deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Supreme Court of the United States:

Your petitioner, Sam Wilner, in his own right and as Administrator of the estate of Meyer Wilner, deceased, prays that a writ of certiorari issue to review the judgment entered January 12, 1934 (R. 26), by the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause.

I.

Summary Statement of the Matter Involved.

Petitioner sued April 28, 1933, in the District Court under the World War Veterans' Act, 1924, as amended (c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp. U. S. C. A.) to recover total permanent disability and death benefits under the war risk insurance contract of his brother, said intestate (R. 2). His verified petition contains the usual allegations of residence of himself and his intestate, enlistment, discharge, making of the insurance contract and payment of premiums. The date of death alleged is May 15, 1929, and letters of administration May 20, 1929. Petitioner, in his individual capacity, is alleged to have been the beneficiary named in the insurance contract. It is alleged that while said insurance was in force decedent became totally and permanently disabled April 15, 1919 (changed by amendment from "to-wit: August 4, 1918"); that due proof thereof and written demand for payment of said insurance was made to appellee, by decedent, November 15, 1928, and by petitioner of that and said death also, May 17, 1929, followed by written denial April 7, 1933, by the Administrator of Veterans' Affairs on the purported authority of Section 17, Title I, of An Act to Maintain the Credit of the United States Government, Public No. 2, 73rd Congress, approved March 20, 1933, hereinafter called the Economy Act, c. 3, Tit. I, Sec. 17, 48 Stat. 11, Sec. 717, Ch. 12, Title 38, Pocket Supp., U. S. C. A. The petition then alleges that said Act, especially the portion purporting to affect petitioner's claim, is unconstitutional and void as an attempted delegation to an executive official of legislative powers contrary to Section 1, Article I, of the United States constitution and also as a deprivation of petitioner's property without due process of law and a taking of his private property for

public use without just compensation, all contrary to the portions of the Fifth Amendment to said constitution providing that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation. Respondent's general demurrer (R. 7) to said petition was sustained and the petition thereupon dismissed for want of jurisdiction (R. 13). There was a written opinion by the District Court (R. 8).

On petitioner's appeal the judgment was reversed (R. 26), because of the error in awarding judgment for costs against petitioner, and the cause was remanded with directions to dismiss the petition for want of jurisdiction, without costs, the opinion of the reviewing court (R. 21) holding that the claimed constitutional violations did not exist.

II.

Reasons Relied on for Allowance of the Writ.

1. The decision in question involves important questions of federal law which have not been, but should be, settled by the Supreme Court, that is (*a*) whether Section 17, Title I, of the Economy Act, in taking away all rights under such a contract of insurance in order to maintain the credit of the United States Government, without making any compensation therefor, deprives the insured or his beneficiary of property without due process of law, or takes private property for public use without just compensation, contrary to the Fifth Amendment to the United States constitution; and (*b*) whether the said Title I, to the extent that it affects a claim such as petitioner's, is unconstitutional and void because it attempts to delegate to an executive official legislative powers contrary to Section 1, Article I, of said constitution.

2. In its decision of these questions the Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of the Supreme Court (*a*) in *Sinking-Fund Cases*, 99 U. S. 700, 720, 721; *C., M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 496, 501-2; *Coombes* v. *Getz*, 285 U. S. 434, 441-2, 448; *Stanislaus County* v. *San J. & K. R. C. & I. Co.*, 192 U. S. 201, 213; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476; *Stearns* v. *Minnesota*, 179 U. S. 223, 259; *Shields* v. *Ohio*, 95 U. S. 319, 324-5; *Holyoke Co.* v. *Lyman*, 82 U. S. 500, 502; and *Miller* v. *State*, 82 U. S. 478, 498, to the effect that reserved legislative powers of amendment, regulation and repeal give the right to change or regulate the rights of the party with whom, or for whose benefit, the contract was made only in minor and incidental matters in recognition of the continuing existence of the contract, and do not afford any authority whatever to annul or repudiate it, or to destroy all rights contracted to be given thereby: (*b*) also in *Dorchy* v. *Kansas*, 264 U. S. 286, 289-90, 291; *Employers' Liab. Cases*, 207 U. S. 463, 501-2; *Butts* v. *Mer. T. Co.*, 230 U. S. 126, 132, 133; and *Utah P. & L. Co.* v. *Pfort*, 286 U. S. 165, 184-5, to the effect that one portion of an Act of Congress cannot be separated from the other portions and held valid when those other portions are held void, unless the court can determine that Congress would have enacted the remaining portion if it had known that the rest of the Act was void, thus in the instant case endeavoring to uphold the mere incidental portion taking away by implication the right to sue, even though the rest of the Act be void; (*c*) also in *U. S.* v. *Cohen G. Co.*, 255 U. S. 81, 89-91, 92-3; *U. S.* v. *Shreveport G. & E. Co.*, 287 U. S. 77, 85; *I. C. C.* v. *Goodrich T. Co.*, 224 U. S. 194, 214, 215; *Louisville B. Co.* v. *U. S.*, 242 U. S. 409, 424-5; *U. S.* v. *Chi. etc. R. Co.*, 282 U. S. 311, 324; *Field* v. *Clark*, 143 U. S. 649, 692-4; and *Buttfield* v. *Stranahan*, 192 U. S. 470, 496, to the effect that discretionary powers may be given to an official of the executive

department in the administration of laws enacted by Congress, only where Congress fixes the primary standard to guide and limit him in the exercise of such discretion.

III.

Statutes Involved.

Economy Act, March 20, 1933, c. 3, Tit. I, Secs. 1, 2, 3, 4, 5, 17, 48 Stat. 11, Secs. 701, 702, 703, 704, 705, 717, Ch. 12, Tit. 38, Pocket Supp. U. S. C. A.

World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp., U. S. C. A.

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion in the United States Circuit Court of Appeals (R. 21) is not yet reported.

II.

Jurisdiction.

The date of the judgment to be reviewed is January 12, 1934 (R. 26). The jurisdiction of the court is invoked under Sec. 240 (*a*) of the Judicial Code as amended, c. 229, 43 Stat. 938, 28 U. S. C. A., Sec. 347.

III.

Statement of the Case.

The facts stated in the foregoing petition (pp. 2-3) are hereby adopted as a part of this brief.

IV.

Specification of Error.

The United States Circuit Court of Appeals for the Seventh Circuit erred in directing the District Court to enter judgment dismissing the petition.

V.

ARGUMENT.

The instant case affects not only, directly, the rights of the many thousands of war veterans and beneficiaries whose matured insurance claims had not been administratively decided prior to March 20, 1933, but also, indirectly, almost every citizen, in that it involves questions, woven into the fabric of much of the recent federal legislation, of taking private property for public use without just compensation and without due process of law, and of delegation of uncontrolled, unlimited and despotic discretionary powers to the executive to regulate the affairs of nearly everybody. It was error to direct the District Court to dismiss the petition because:

I.

Vested Right Exists.

It seems to be conceded by the Court of Appeals in the instant case, that if petitioner had a vested right to the insurance sued for, the portion of the Economy Act complained of would be unconstitutional, as a taking of private property for public use without just compensation and without due process of law, but that court has attempted to avoid that result by denying any such vested right, on the theory that the reserved powers in the contract of insurance making it subject to subsequently adopted amendments and regulations gave the right to destroy the contract even after it had matured, and on the theory that

White v. *U. S.*, 270 U. S. 175, denies any vested right in such contracts.

However, all such reserved powers, even those of revocation or repeal, are held to give the right to change or regulate the rights of the parties only in minor and incidental matters in recognition of the continued existence of the contract and do not afford any authority whatever to annul the contract, or repudiate it, or to destroy all rights contracted to be given thereby; and this is true with respect to such reserved powers as to all contracts, whether they be contained in a grant of a corporate charter,

Sinking-Fund Cases, 99 U. S. 700, 720, 721.
C., M. & St. P. R. Co. v. *Wisconsin*, 238 U. S. 491, 496, 501-2.
Coombes v. *Getz*, 285 U. S. 434, 441-2, 448.
Stanislaus County v. *San J. & K. R. C. & I. Co.*, 192 U. S. 201, 213.
Close v. *Glenwood Cem.*, 107 U. S. 466, 476.
Stearns v. *Minnesota*, 179 U. S. 223, 259.
Shields v. *Ohio*, 95 U. S. 319, 324-5.
Holyoke Co. v. *Lyman*, 82 U. S. 500, 522.
Miller v. *State*, 82 U. S. 478, 498.

or in private contracts of insurance.

Newhall v. *Sup. C. A. L. of H.*, 181 Mass. 111, 116-7; 63 N. E. 1 (Holmes, J.).
O'Neill v. *Sup. C. A. L. of H.*, 70 N. J. L. 410, 420-1; 57 A. 463, 467.
Lloyd v. *Sup. L. K. P.*, 98 F. 66, 70 (C. C. A. 7).

In the instant case the enactment in question does not, as the Court of Appeals supposes, merely withdraw consent to be sued on yearly renewable term insurance contracts and leave the liability of the United States on such contracts to be determined by an administrative official, but seizes the obligation absolutely and does not leave the determination of rights thereunder to anybody whatso-

ever. Neither the President nor the Administrator of Veterans' Affairs is given any right whatever to allow claims for yearly renewable term insurance and they could not, under the provisions of the Economy Act, allow petitioner's claim even if they desired to do so. The power given by that Act to allow claims, refers to other kinds of claims altogether, those created or preserved by said Title I, and not those destroyed by it, and it is with respect to such other claims that the decision of the Administrator of Veterans' Affairs is made final without any right of review by the courts.

The Court of Appeals is also mistaken in assuming that *White* v. *U. S.*, 270 U. S. 175, supports the contention that by virtue of the reserved powers, or otherwise, there is no vested right in a war risk insurance contract. In that case the soldier had changed the designation of beneficiary to his aunt, who was not in the eligible class. After a few months' payment of death benefits to the former beneficiary, Congress enlarged the class of permitted beneficiaries to include an aunt and made the amendment retroactive. This was held to apply to the existing contract in spite of the supposed rights of the former beneficiary, but that beneficiary had not been a party to the contract and the soldier had not wanted that beneficiary to receive any of the insurance but had wanted it to go to his aunt, and it was held the government could waive the limitation made for its benefit and give effect to the wish of the soldier to have the aunt become beneficiary. The government did not claim it could destroy the contract or take it to itself altogether, but argued that the change was to make the wish of the insured effective and was valid as a curative act. Even if it were true that a beneficiary has no vested right, the instant case involves not only the right of a beneficiary to death benefits, but also the right of the insured soldier himself to total permanent

disability benefits which matured during his lifetime and which are sued for by his administrator in the right of the insured and not as beneficiary.

Violation of Fifth Amendment.

Destruction has been held to be a taking within the meaning of the Fifth Amendment.

Pumpelly v. *Green Bay Co.*, 13 Wall. (60 U. S.) 166, 177-8.

The taking need not be by court proceeding, but the government must pay just compensation regardless of the manner of taking.

U. S. v. *Lynah*, 188 U. S. 445, 468, 471, 474.

It cannot rightfully be contended that in the instant case there was no taking, but merely an indirect and consequential damage."

U. S. v. *Welch*, 217 U. S. 333, 338-9.
Pumpelly v. *Green Bay Co.*, 13 Wall. (60 U. S.) 166, 177-8.
U. S. v. *Lynah*, 188 U. S. 445, 468, 471, 474.

This taking for public use is an exercise of the right of eminent domain and is not confined to real estate, but extends to contracts.

Russian V. Fleet v. *U. S.*, 282 U. S. 481, 486, 489.
Cincinnati v. *L. & N. R. Co.*, 223 U. S. 390, 400.
Brooks-S. Corp. v. *U. S.*, 265 U. S. 106, 123.

The prohibitions in the Fifth Amendment against taking property without just compensation or without due process of law are limitations upon the powers granted to the federal government either specifically, or in general terms, or by implication, in other portions of the constitution.

U. S. v. *Chi. etc. R. Co.*, 282 U. S. 311, 327-8.
U. S. v. *Cress*, 243 U. S. 316, 319-20, 326.
Monongahela N. Co. v. *U. S.*, 148 U. S. 312, 325.
Hurtado v. *California*, 110 U. S. 516, 535-7.

Taking private property for public use without just compensation is also prohibited on general principles of justice, regardless of any specific constitutional prohibition.

Fletcher v. *Peck,* 10 U. S. 87, 135.

Instances of the application of the constitutional prohibition in question to acts adopted to meet a public emergency are

So. Ry. Co. v. *Con. F. Co.,* 203 Ky. 441, 442-5; 262 S. W. 581.

Highland v. *Russell C. Co.,* 279 U. S. 253, 258, 259-60.

Phelps v. *U. S.,* 274 U. S. 341, 343, 344.

The emergency resulting from economic conditions, whether greater or less than war emergency, cannot suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth Amendment, any more than so grave an emergency as a state of war can do so.

U. S. v. *Cohen G. Co.,* 225 U. S. 81, 88-9.

Home B. & L. Assn. v. *Blaisdell,* 54 S. Ct. Rep. 231, 235.

Wilson v. *New,* 243 U. S. 332, 348, 370-2, 376-7.

Ex parte Milligan, 4 Wall. 2, 120, 125, 126.

Beck, The Future of the Constitution, 19 Am. Bar Assn. Journal, No. 9, Sept. 1933, pp. 493, 497, 498, 540.

The *Legal Tender Cases* do not establish the validity of the enactment now under attack, because they do not apply to the facts, and, even were it otherwise, should be disregarded because of the peculiar circumstances under which they were decided, whereby a five to four decision overruled a five to three decision;

Legal Tender Cases, 79 U. S. 457,

Hepburn v. *Griswold,* 75 U. S. 603,

and also because one of the principles on which the *Legal Tender Cases*, 79 U. S. 457, 551, were based, that the taking referred to in the Fifth Amendment meant only a direct appropriation and not consequential injuries resulting from the exercise of lawful power, has been overruled in later cases.

U. S. v. *Lynah*, 188 U. S. 445, 468, 471, 474.
U. S. v. *Cress*, 243 U. S. 316, 319-20, 326.
Pumpelly v. *Green Bay Co.*, 13 Wall. (80 U. S.) 166, 177-8.

It is unnecessary to deny that Congress could withdraw the consent of the United States to be sued on war risk insurance contracts by an act devoted to the single purpose of such withdrawal, although even in that event some other method of ascertaining and performing such obligations of the United States would probably have to be provided. Congress did not merely withdraw consent to suit, but that withdrawal is a mere incident, by implication alone, to a seizure and confiscation of the contract obligations of the United States in order to maintain its financial credit, regardless of how reprehensible such a course may be, or how destructive of its honor and moral credit (John Jay, 5 Journals of Congress 351, 1 Flanders' Lives and Times of the Chief Justices 256), and it is not to be presumed that Congress would have enacted a withdrawal of consent to suit, if it had known the remainder of the Act was void. Without such presumption a part only of the Act cannot be sustained.

Dorchy v. *Kansas*, 264 U. S. 286, 289-90, 291.
Empolyers' Liab. Cases, 207 U. S. 463, 501-2.
Butts v. *Mer. T. Co.*, 230 U. S. 126, 132, 133.
Utah P. & L. Co. v. *Pfort*, 286 U. S. 165, 184-5.
Sage v. *Baldwin*, 55 F. (2d) 968, 970.
The People v. *McBride*, 234 Ill. 146, 165-6; 84 N. E. 865.
State v. *Cumberland Club*, 136 Tenn. 84, 101; 188 S. W. 583, 587.

The theory of the District Court, not adopted by the Court of Appeals, that the statute of limitations justifies the sustaining of the demurrer, is unsound, because in an action at law the defense of limitations can be availed of by plea only, not by demurrer.

Wall v. *C. & O. R. Co.*, 200 Ill. 66, 67-8; 65 N. E. 632.

Even were it otherwise, the amended date of beginning of total permanent disability, as shown by the opinion of the Court of Appeals (R. 22), was within the ten-year limitation period. Even under the petition before amendment such date was alleged under a videlicet and the petition shows that the premiums were paid out of decedent's pay as a soldier until his discharge from the army, March 31, 1919, which kept his insurance in force to May 1, 1919, and the allegation of the disability date under a videlicet was sufficient as an allegation of any date within the statute of limitations while the insurance was in force and therefore on the face of the petition the statute had not run.

Collins v. *San. Dist.*, 270 Ill. 108, 111; 110 N. E. 318.

T., P. & W. Ry. Co. v. *McClannon*, 41 Ill. 238, 240-1.

In this respect the instant case differs from *Lynch* v. *U. S.*, 67 F. (2d) 490, which has been distinguished in somewhat similar manner in a district court case which also holds the enactment now in question unconstitutional as a violation of the Fifth Amendment.

Harris v. *U. S.*, 5 Fed. Supp. 368.

II.

Unconstitutional Delegation of Legislative Powers.

Title I, of the Economy Act is also void as an unconstitutional delegation of legislative powers to the executive department, contrary to Section 1, Article I, of the constitution. This delegation is found mainly in the pension and compensation features of the Act and other matters not embraced within war risk insurance, but petitioner has a right to raise the constitutional question because he is adversely affected by a portion of the Act and it cannot be sustained in part, for it cannot be certain that Congress would have enacted the portion affecting petitioner if it had known that the other portions were void, and a mere possibility or doubt will not be sufficient to uphold it in part, as the court cannot exercise the legislative powers and discretion of Congress.

Dorchy v. *Kansas*, 264 U. S. 286, 289-90, 291.
Employers' Liab. Cases, 207 U. S. 463, 501-2.
Butts v. *Mer. T. Co.*, 230 U. S. 126, 132, 133.
Utah P. & L. Co. v. *Pfort*, 286 U. S. 165, 184-5.
The People v. *McBride*, 234 Ill. 146, 165-6; 84 N. E. 865.
State v. *Cumberland Club*, 136 Tenn. 84, 101; 188 S. W. 583, 587.

"there is no right of mutilation and a court will not resort to elimination."

Sage v. *Baldwin*, 55 F. (2d) 968, 970.

The Court of Appeals errs in supposing that the Economy Act delegates to anybody the right to pass upon war risk insurance claims that had not been allowed or disallowed prior to March 20, 1933, for such right is entirely abolished by that Act, although the Court of Appeals is right in deciding that the duty of passing upon claims

against the United States may be delegated to administrative bodies or officials. This is so because such functions are fact-finding ones, not involving the exercise of discretion. The allowance of pensions may be delegated, just as other discretionary powers may be given to an official of the executive department in the administration of other laws enacted by Congress; but in such cases the primary standards for such allowances or the exercise of such discretionary powers must be fixed by Congress and not left to the unguided discretion of the officials in question.

U. S. v. *Cohen G. Co.*, 255 U. S. 81, 89-91, 92-3.
U. S. v. *Shreveport G. & E. Co.*, 287 U. S. 77, 85.
I. C. C. v. *Goodrich T. Co.*, 224 U. S. 194, 214, 215.
Louisville B. Co. v. *U. S.*, 242 U. S. 409, 424-5.
U. S. v. *Chi. etc. R. Co.*, 282 U. S. 311, 324.
Field v. *Clark*, 143 U. S. 649, 692-4.
Buttfield v. *Stranahan*, 192 U. S. 470, 496.

Congress may not delegate its legislative powers.

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149, 164.

The objectionable delegation of unlimited discretion in Title I of the Economy Act is to be found in the provisions of Section 1, that certain classes "may" be paid a pension, "subject to such requirements and limitations as shall be contained in regulations to be issued by the President;" of Section 1 (*b*) that the President may reduce the pension rate "as he may deem proper;" in the fact that no provision requires the allowance of any pension to any class unless the President shall desire to pay it; in the absence of any guide for the discretion of the President in determining the amount of pension within the wide limits of $6 to $275 per month for disability and $12 to $75 per month for death in Section 2; in the provisions of Section 3 authorizing the President to prescribe the "minimum degrees

of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension," therefor, without in any way fixing any rule or principle for designating such minimum and maximum other than the mere whim of the President, and further authorizing the President to prescribe "such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars," but leaving it to his uncontrolled discretion to determine just what shall be just and equitable; in the provisions of Section 4 that the President shall prescribe by regulation the date of beginning and termination of the period in each war, service within which shall be deemed war-time service, in spite of the fact that the wars in question had become history and the facts on that point were as available to Congress as to the President; also in the provisions of Section 4 that the President shall prescribe "by regulation the required number of days of war or peace time service for each class of veterans, the time limit on filing of claims" and "any other requirements as to entitlement as he shall deem equitable and just," thereby leaving it to the President to determine a matter which could have been determined as easily by Congress from facts equally available to both and authorizing the President to enact a statute of limitations. The Section goes on to say that the President "may prescribe different requirements or conditions for the veterans of different wars" and may further subdivide the classes of persons and apply different requirements or conditions to such subdivisions. This, of course, means discrimination between various classes of veterans, not according to any rule fixed by Congress, but according to the whim of the President.

The combination of legislative and executive powers in one man or body of men, is not in harmony with our system of government and is the very essence of despotism and tyranny and should be resisted at the outset, even

though the depositary of the unlawful powers may be actuated by good motives, or the immediate purpose may be the accomplishment of a desirable end, for it is by just such means that free governments are destroyed.

O'Donoughue v. *U. S.*, 289 U. S. 516, 530.

Farewell Address, 12 Writings of Washington 226.

James Madison, The Federalist, No. 47, pp. 373-4, and No. 44, p. 351.

Thomas Jefferson, Notes on the State of Virginia, p. 195, quoted by James Madison, The Federalist, No. 48, p. 385.

2 *Writings and Speeches of Daniel Webster* 107.

14 *id.* 362.

McCarran, Growth of Federal Executive Power, 19 Am. Bar Assn. Jour. No. 10, Oct. 1933, pp. 587, 588, 589-90, 591, 592.

Conclusion.

When the legislative and executive departments join in a violation of the constitution, the Supreme Court is the last resort for the upholding of the rights of the citizen and the preservation of the constitution. In order that such functions may be exercised, the instant case ought to be reviewed on certiorari.

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioner.

APPENDIX.

Economy Act, March 20, 1933, c. 3, Secs. 1, 2, 3, 4, 5, 17, Title I, 48 Stat. 11, Secs. 701, 702, 703, 704, 705, 717, ch. 12, Tit. 38 Pocket Supp. U. S. C. A.:

SECTION 1. That subject to such requirements and limitations as shall be contained in regulations to be issued by the President, and within the limits of appropriations made by Congress, the following classes of persons may be paid a pension:

(*a*) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service.

(*b*) Any person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, or the World War, and who is permanently disabled as a result of injury or disease; *Provided,* That nothing contained in this title shall deny a pension to a Spanish-American War veteran past the age of sixty-two years entitled to a pension under existing law, but the President may reduce the rate of pension as he may deem proper.

(*c*) The widow, child, or children, dependent mother or father, of any person who dies as a result of disease or injury incurred or aggravated in line of duty in the active military or naval service.

(*d*). The widow and/or child of any deceased person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection.

(*e*) For the purpose of subparagraph (*b*) of this section, the World War shall be deemed to have ended November 11, 1918.

SECTION 2. The minimum and maximum monthly rate of pension which may be paid for disability or death shall be as follows: For disability, from $6 to $275; for death, from $12 to $75.

SECTION 3. For each class of persons specified in subparagraphs (*a*) and (*b*) of section 1 of this title the President is hereby authorized to prescribe by regulation the minimum degrees of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension payable for each such degree of disability. In fixing rates of pensions for disability or death the President shall prescribe by regulation such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars and/or their dependents and to be paid for.

(*a*) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in war-time service;

(*b*) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in peace-time service;

(*c*) Disabilities and deaths not incurred in service.

SECTION 4. The President shall prescribe by regulation (subject to the provisions of section 1 (*e*) of this title) the date of the beginning and of the termination of the period in each war subsequent to the Civil War, including the Boxer Rebellion and the Philippine Insurrection, service within which shall for the purposes of this Act be deemed war-time service. The President shall further prescribe by regulation the required number of days of war or peace time service for each class of veterans, the time

limit on filing of claims for each class of veterans and their dependents, the nature and extent of proofs and presumptions for such different classes, and any other requirements as to entitlement as he shall deem equitable and just. The President in establishing conditions precedent may prescribe different requirements or conditions for the veterans of different wars and their dependents and may further subdivide the classes of persons as outlined in section 1 of this title and apply different requirements or conditions to such subdivisions.

SECTION 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United Sttaes shall have jurisdiction to review by mandamus or otherwise any such decision.

SECTION 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * * Provided, that nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this chapter and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *

World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp. U. S. C. A.:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the Dis-

trict of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, * * * *Provided further*, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * No state or other statute of limitations shall be applicable to suits filed under this section. * * *.

The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter.

FILE COPY

FILED
APR 16 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No. 861

SAM WILNER in his own right and as Administrator of the Estate of Meyer Wilner, deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

EDWARD H. S. MARTIN,
10 S. LaSalle Street,
Chicago, Illinois,
Attorney for Petitioner.

State Law Printing Company, 173 W. Madison St., Chicago—FRAnklin 5501

INDEX.

SUBJECT INDEX.

	PAGE
Opinion of court below	1
Jurisdiction	1
Statement of the case	2
Specification of error	3
Argument	4
Vested right exists	4
Reserved powers do not authorize destruction of all contract rights	4
Economy Act confiscates insurance and does not merely withdraw consent to suit	5
White v. U. S., distinguished	5
War risk insurance a contract, not a pension	6
Economy Act violates 5th Amendment	7
Emergency does not nullify 5th Amendment	11
Legal Tender Cases not controlling	17
Economy Act merely gives veterans' money to others	18
Economy Act cannot stand as mere withdrawal of consent to suit	20
Repudiation disgraceful	20
Statute of limitations not available as defense	22
Unconstitutional delegation of legislative powers	23
Petitioner's right to question such delegation	23
Economy Act preserves no administrative remedy on war risk insurance	5, 25

PAGE

Congress may not grant unlimited discretion, nor delegate legislative powers 26

Such delegation appears in Economy Act 27

Combination of legislative and executive powers in some person despotic and destructive of free government 28

Also puts too great a burden on one man 36

Unconstitutional character of trend of recent legislation 41

Conclusion 43

Appendix 45

Economy Act, various sections 45

World War Veterans' Act 47

Veterans' Regulations 48

TABLE OF CASES CITED.

Block v. Hirsh, 256 U. S. 135 15

Brooks-S. Corp. v. U. S., 265 U. S. 106 8

Buttfield v. Stranahan, 192 U. S. 470 27

Butts v. Mer. T. Co., 230 U. S. 126 ..... 21, 25

C. B. & Q. R. Co. v. Chicago, 166 U. S. 226 20

Cincinnati v. L. & N. R. Co., 223 U. S. 390 8

Civil Rights Cases, 109 U. S. 3 15

Close v. Glenwood Cemetery, 107 U. S. 466 5

C., M. & St. P. R. Co. v. Wisconsin, 238 U. S. 491 4

Collins v. San. Dist., 270 Ill. 108 23

Coombes v. Getz, 285 U. S. 434 5

Dorchy v. Kansas, 264 U. S. 286 ..... 20, 24

Employers' Liab. Cases, 270 U. S. 463 ..... 20, 25

	PAGE
Ex parte Milligan, 4 Wall. 2	12, 14
Field v. Clark, 143 U. S. 649	27
Fletcher v. Peck, 10 U. S. 87	11
Gardner v. Newburgh, 2 Johns. Ch. 162	20
Harris v. U. S., 5 F. Supp. 368	23
Hepburn v. Griswold, 75 U. S. 603	17
Highland v. Russell C. Co., 279 U. S. 253	11
Holyoke Co. v. Lyman, 82 U. S. 500	5
Home B. & L. Assn. v. Blaisdell, 290 U. S. 398	11
House v. Mayes, 219 U. S. 270	15
Hurtado v. California, 110 U. S. 516	11
I. C. C. v. Goodrich T. Co., 224 U. S. 194	27
Knickerbocker Ice Co. v. Stewart, 253 U. S. 149	26
Legal Tender Cases, 79 U. S. 457	17, 18, 22
Liggett v. U. S., 274 U. S. 215	8
Lloyd v. Sup. L. K. P., 98 F. 66	5
Louisville B. Co. v. U. S., 242 U. S. 409	27
Lynch v. U. S., 67 F. (2d) 490	23
Miller v. State, 82 U. S. 478	5
Monongahela N. Co. v. U. S., 148 U. S. 312	10
Newhall v. Sup. C. A. L. of H., 181 Mass. 111	5
O'Donoghue v. U. S., 289 U. S. 516	31
O'Neill v. Sup. C. A. L. of H., 70 N. J. L. 410	5
People v. McBride, 234 Ill. 146	21, 25
Phelps v. U. S., 274 U. S. 341	11
Pumpelly v. Green Bay Co., 13 Wall. 166	7, 8, 18
Russian V. Fleet v. U. S., 282 U. S. 41	8
Sage v. Baldwin, 55 F. (2d) 968	21, 25
Shields v. Ohio, 95 U. S. 319	5

PAGE

Sinking Fund Cases, 99 U. S. 700 4
Sinnickson v. Johnson, 17 N.J.L. 129 20
Slaughter House Cases, 16 Wall. 36 15
So. Ry. Co. v. Con. F. Co., 203 Ky. 441 11
Stanislaus County v. San. J. & K. R. C. & I. Co., 192 U. S. 201 5
State v. Cumberland Club, 136 Tenn. 84 ..... 21, 25
Stearns v. Minnesota, 179 U. S. 223 5
T., P. & W. Ry. Co. v. McClannon, 41 Ill. 238 23
Trade-Mark Cases, 100 U. S. 82 24
U. S. v. Chi. etc. R. Co., 282 U. S. 311 ..... 9, 27
U. S. v. Cohen G. Co., 255 U. S. 81 ..... 12, 26
U. S. v. Cress, 243 U. S. 316 ..... 9, 18
U. S. v. Dewitt, 9 Wall. 41 15
U. S. v. Lynah, 185 U. S. 445 ..... 8, 18
U. S. v. Shreveport G. & E. Co., 287 U. S. 77 27
U. S. v. Welch, 217 U. S. 333 8
Utah P. & L. Co. v. Pfort, 286 U. S. 165 ..... 21, 25
Wall v. C. & O. R. Co., 200 Ill. 66 22
White v. U. S., 270 U. S. 175 ..... 4, 5, 6
Wilner v. U. S., 68 F. (2d) 442 1
Wilson v. New, 243 U. S. 332 12

TABLE OF STATUTES AND TEXTBOOKS CITED.

Am. Bar Assn. Jour. v. 19, No. 9, Sept., 1933, p. 493 ..... 15, 16
Am. Bar Assn. Jour. v. 19, No. 10, Oct., 1933, p. 587 33
Beck, Future of the Constitution, 19 Am. Bar. Assn. Jour. 493 ..... 15, 16
Economy Act, various sections 2, 4, 5, 7, 23, 25, 27, 37, 40, 45

PAGE

Farewell Address, 12 Writings of Washington 226 31

Federalist, No. 44, p. 351, No. 47, p. 373, No. 48, p. 385 ..... 32, 33, 42

Flander's Life and Times of the Chief Justices, v. 1, p. 256 27

Jay, John, 5 Journals of Cong. 351 21

Jefferson, Notes on the State of Virginia, 195, The Federalist No. 48, p. 385 33

Journals of Cong., v. 5, p. 351 22

Judicial Code, Sec. 240 (a) 1

Madison, James, The Federalist, No. 44, p. 351, No. 47, p. 373 ..... 32, 42

McCarran, Growth of Federal Executive Power, 19 Am. Bar Assn. Jour., No. 10, Oct., 1933, p. 587 33

Veterans Regulation 38, 39, 48

War Risk Ins. Act, Sec. 401 39

Washington's Farewell Address, 12 Writings of Washington 226 31

Webster, Daniel, Writings and Speeches of, v. 2, p. 107, v. 14, p. 362 ..... 30, 31

World War Veterans' Act 2, 47

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933

No. 861.

SAM WILNER in his own right and as Administrator of the Estate of Meyer Wilner, deceased,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is reported in 68 F. (2d) 442.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 12, 1934. The jurisdiction of the court is invoked under Sec. 240(a), of the Judicial Code as amended, c. 229, 43 Stat. 938, 28 U.S.C.A., Sec. 347. Certiorari was granted April 9, 1934, upon a petition filed March 14, 1934.

Statement of the Case.

Petitioner sued April 28, 1933, in the District Court under the World War Veterans' Act, 1924, as amended (c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp. U.S.C.A.) to recover total permanent disability and death benefits under the war risk insurance contract of his brother, said intestate (R 2). His verified petition contains the usual allegations of residence of himself and his intestate, enlistment, discharge, making of the insurance contract and payment of premiums. The date of death alleged is May 15, 1929, and letters of administration May 20, 1929. Petitioner, in his individual capacity, is alleged to have been the beneficiary named in the insurance contract. It is alleged that while said insurance was in force decedent became totally and permanently disabled April 15, 1919 (changed by amendment from "to-wit: August 4, 1918"); that due proof thereof and written demand for payment of said insurance was made to appellee, by decedent, November 15, 1928, and by petitioner of that and said death also, May 17, 1929, followed by written denial April 7, 1933, by the Administrator of Veterans' Affairs on the purported authority of Section 17, Title I, of An Act to Maintain the Credit of the United States Government, Public No. 2, 73rd Congress, approved March 20, 1933, hereinafter called the Economy Act, c. 3, Tit. I, Sec. 17, 48 Stat. 11, Sec. 717, Ch. 12, Tit. 38, Pocket Supp., U.S.C.A. The petition then alleges that said Act, especially the portion purporting to affect petitioner's claim, is unconstitutional and void as an attempted delegation to an executive official of legislative powers contrary to Section 1, Article I, of the United States constitution and also as a deprivation of petitioner's property without due process of law and a taking of his private property for public use without just compensation, all

ontrary to the portions of the Fifth Amendment to said onstitution providing that no person shall be deprived of roperty without due process of law, nor shall private roperty be taken for public use without just compensa-ion. Respondent's general demurrer (R 7) to said peti-ion was sustained and the petition thereupon dismissed for want of jurisdiction (R 13). There was a written opin-ion by the District Court (R 8).

On petitioner's appeal the judgment was reversed (R 26), because of the error in awarding judgment for costs against petitioner, and the cause was remanded with directions to dismiss the petition for want of jurisdiction, without costs, the opinion of the reviewing court (R 21), 68 F. (2d) 442, holding that the claimed constitutional violations did not exist.

Specification of Error.

The United States Circuit Court of Appeals for the Seventh Circuit erred in directing the District Court to enter judgment dismissing the petition.

ARGUMENT.

I.

Vested Right Exists.

It seems to be conceded by the Court of Appeals in the instant case, that if petitioner had a vested right to the insurance sued for, the portion of the Economy Act complained of would be unconstitutional, as a taking of private property for public use without just compensation and without due process of law, but that court has attempted to avoid that result by denying any such vested right, on the theory that the reserved powers in the contract of insurance making it subject to subsequently adopted amendments and regulations gave the right to destroy the contract even after it had matured, and on the theory that *White* v. *U. S.*, 270 U. S. 175, denies any vested right in such contracts.

However, all such reserved powers, even those of revocation or appeal, are held to give the right to change or regulate the rights of the parties only in minor and incidental matters in recognition of the continued existence of the contract and do not afford any authority whatever to annul the contract, or repudiate it, or to destroy all rights contracted to be given thereby; and this is true with respect to such reserved powers as to all contracts, whether they be contained in a grant of a corporate charter,

Sinking-Fund Cases, 99 U. S. 700, 720, 721.
C., M. & St. P. R. Co. v. *Wisconsin*, 238 U. S. 491, 496, 501-2.

Coombes v. Getz, 285 U. S. 434, 441-2, 448.
Stanislaus County v. *San J. & K. R. C. & I. Co.*, 192 U. S. 201, 213.
Close v. *Glenwood Cem.*, 107 U. S. 466, 476.
Stearns v. *Minnesota*, 179 U. S. 223, 259.
Shields v. *Ohio*, 95 U. S. 319, 324-5.
Holyoke Co. v. *Lyman*, 82 U. S. 500, 522.
Miller v. *State*, 82 U. S. 478, 498.

or in private contracts of insurance,

Newhall v. *Sup. C. A. L. of H.*, 181 Mass. 111, 116-7; 63 N. E. 1 (Holmes, J.).
O'Neill v. *Sup. C. A. L. of H.*, 70 N. J. L. 410, 420-1; 57 A. 463, 467.
Lloyd v. *Sup. L. K. P.*, 98 F. 66, 70 (C.C.A. 7).

In the instant case the enactment in question does not, as the Court of Appeals supposes, merely withdraw consent to be sued on yearly renewable term insurance contracts and leave the liability of the United States on such contracts to be determined by an administrative official, but seizes the obligation absolutely and does not leave the determination of rights thereunder to anybody whatsoever. Neither the President nor the Administrator of Veterans' Affairs is given any right whatever to allow claims for yearly renewable term insurance and they could not, under the provisions of the Economy Act, allow petitioner's claim even if they desired to do so. The power given by Section 5 of that Act to allow claims, refers to other kinds of claims altogether, those created by Section 1 and regulated by Sections 2 to 4 of said Title I, and not those destroyed by Section 17, and it is with respect to such other claims that the decision of the Administrator of Veterans' Affairs is made final without any right of review by the courts.

The Court of Appeals is also mistaken in assuming that *White* v. *U. S.*, 270 U. S. 175, supports the contention that

by virtue of the reserved powers, or otherwise, there is no vested right in a war risk insurance contract. In that case the soldier had changed the designation of beneficiary to his aunt, who was not in the eligible class. After a few months' payment of death benefits to the former beneficiary, Congress enlarged the class of permitted beneficiaries to include an aunt and made the amendment retroactive. This was held to apply to the existing contract in spite of the supposed rights of the former beneficiary, but that beneficiary had not been a party to the contract and the soldier had not wanted that beneficiary to receive any of the insurance but had wanted it to go to his aunt, and it was held the government could waive the limitation made for its benefit and give effect to the wish of the soldier to have the aunt become beneficiary. The government did not claim it could destroy the contract or take it to itself altogether, but argued that the change was to make the wish of the insured effective and was valid as a curative act. Even if it were true that a beneficiary has no vested right, the instant case involves not only the right of a beneficiary to death benefits, but also the right of the insured soldier himself to total permanent disability benefits which matured during his lifetime and which are sued for by his administrator in the right of the insured and not as beneficiary.

The fanciful theory that there was no contract, but war risk insurance was a mere pension, because the government wrote war risk insurance at lower rates than private companies, is without authoritative support. In fact, *White* v. *U. S.*, 270 U. S. 175, expressly decides that war risk insurance is a contract. When the insurance was offered it could not be known whether the premium rate was less or more than cost. If the war had ended earlier, or if our armed forces had not been sent to Europe, but had been kept at home or on the seas only, it is likely the insurance business would have made the government a profit.

Even if the government had written the insurance at less than cost and had received no commensurate benefit for the excess cost which it carried, the relation would, nevertheless, be one of contract. The time has not yet come when any insurer, private or governmental, will be heard to say that it should be relieved of its obligations because, either through error of judgment or deliberately, it contracted for too low a premium. However, in insuring at a premium rate below the cost of war time insurance, the government did not give something for nothing. It was entirely the other way around. The excess cost which the government assumed, was, in exactly the same degree as the $30 to $36 per month which it paid to its soldiers in cash, their wages for the arduous and dangerous work which they did in fighting for their country and risking, and in many cases surrendering, their health and their lives, and it ill comports with even the slightest considerations of decency to say that they were overpaid.

II.

Violation of the Fifth Amendment.

The Act in question violates the Fifth Amendment by abolishing, without compensation, petitioner's war risk insurance, which had matured by total permanent disability and death long before the enactment of the Act. The very title of the Act shows the taking to be for public use, namely, "to maintain the credit of the United States Government." It matters not that the taking is by destruction, for that is a taking within the meaning of the Fifth Amendment. It was so held in deciding that a land owner had a constitutional right to compensation for his land because its value was destroyed by overflow caused by public works built on other land.

Pumpelly v. *Green Bay Co.*, 13 Wall. (60 U. S.) 166, 177-8.

The right to compensation exists regardless of the manner of taking and without any formal eminent domain proceeding or suit.

U. S. v. *Lynah,* 188 U. S. 445, 468, 471, 474.

If it be contended that there was no taking of petitioner's property, but merely an indirect and consequential damage, the case does not differ in principle from those in which the same argument was overruled with respect to damage to land by overflow caused by dams built on other land, or caused by destruction of a right of way on other land.

Pumpelly v. *Green Bay Co.,* 13 Wall. (60 U. S.) 166, 177-8.
U. S. v. *Lynah,* 188 U. S. 445, 468, 471, 474.
U. S. v. *Welch,* 217 U. S. 333, 338-9.

The protection of the Fifth Amendment is not confined to real estate, but extends to the taking of contract rights, and is as broad as the right of eminent domain itself.

Russian V. Fleet v. *U. S.,* 481, 486, 489.
Brooks-S. Corp. v. *U. S.,* 265 U. S. 106, 123.

> "This power extends to tangibles and intangibles alike. A chose in action, a charter, or any kind of a contract, are, along with land and movables, within the sweep of this sovereign authority. * * * Every contract, whether between the State and an individual or between individuals only, is subject to this general law. There enters into every engagement the unwritten condition that it is subordinate to the right of appropriation to a public use."
>
> *Cincinnati* v. *L. & N. R. Co.,* 223 U. S. 390, 400.

It also extends to other personal property.

Liggett v. *U. S.,* 274 U. S. 215, 218, 220.

The prohibitions in the Fifth Amendment against taking property without just compensation or without due process of law are limitations upon the powers granted to the federal government either specifically, or in general terms, or by implication, in other portions of the constitution.

> "The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation."
>
> *U. S.* v. *Chi., etc. R. Co.*, 282 U. S. 311, 327-8.

> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."
>
> *U. S.* v. *Cress*, 243 U. S. 316, 319-20, 326.

The foregoing was a case which held there was a taking for public use where a dam lower on a river backed up the water to the plaintiff's mill so it could not be used part of the time and destroyed only one-half of the value of the property.

> "in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. * * * 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'

The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government."

Monongahela N. Co. v. *U. S.*, 148 U. S. 312, 325.

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. * * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. * * *

'It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism. It may be doubted, if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness and the security of which is essential to that happiness, under the unlimited

dominion of others, whether it is not wiser that this power should be exercised by one man than by many.'"

Hurtado v. *California*, 110 U. S. 516, 535-7.

Perhaps the constitutional provision in question is a mere declaration of the inherent right of a free people which would even exist without it and is incapable of being taken away.

> "It may well be doubted, whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection."

Fletcher v. *Peck*, 10 U. S. 87, 135.

Instances of the application of the constitutional prohibition in question to acts adopted to meet a public emergency are

So. Ry. Co. v. *Con. F. Co.*, 203 Ky. 441, 442-5; 262 S. W. 581.

Highland v. *Russel C. Co.*, 279 U. S. 253, 258, 259-60.

Phelps v. *U. S.*, 274 U. S. 341, 343, 344.

The emergency resulting from economic conditions, whether greater or less than war emergency, cannot suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth Amendment, any more than so grave an emergency as a state of war can do so.

Home B. & L. Assn. v. *Blaisdell*, 290 U. S. 398, 425.

In declaring Section 4 of the Lever Act void, it was said:

> "We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments * * *. It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view."
>
> *U. S.* v. *Cohen G. Co.*, 255 U. S. 81, 88-9.

The idea that *Wilson* v. *New*, 243 U. S. 332, holds that the constitution may be disregarded in an emergency, is altogether unfounded. The question in that case was whether the Act then under discussion was valid under the commerce clause or void as a deprivation of property without due process of law. The court divided five to four on the question of constitutionality because of divergent views as to the existence of the power, but decided unanimously that emergency can never create a power or authorize a disregard of the constitution, as may be seen from the majority opinion (p. 348) and the following quotations from the dissenting (concurring on this point) opinion (pp. 370-2):

> "If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no emergency and no consequence, whatever their character, could justify the violation of constitutional rights. The argument of justification by emergency was made and answered in this court in *Ex parte Milligan*, 4 Wall. 2. * * * Speaking of the purposes which controlled in the adoption of the Federal Constitution and animated those who framed that instrument this court said, p. 120: 'Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and deci-

sive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.' * * *

"This principle is equally applicable today. Constitutional protection is more essential in times of unrest and agitation than it would be in the security of less turbulent periods. The Constitution intended to protect the citizen against encroachments upon his rights impelled by existing emergencies, or supposed necessity of prompt and vigorous action. Constitutional rights, if they are to be available in time of greatest need, cannot give way to an emergency, however immediate, or justify the sacrifice of private rights secured by the Constitution.

"I agree that a situation, such as was presented to Congress at this time, properly called for the exertion of its proper authority to avert impending calamity. I cannot agree that constitutional rights may be sacrificed because of public necessity, nor taken away because of emergencies which might result in disaster or inconvenience to public or private interests. If this be not so, the constitutional limitations for the protection of life, liberty, and property, are of little value, and may be taken away whenever it is supposed that the public interests will be promoted by the sacri-

fice of rights which the framers of the Constitution intended should be forever protected from government invasion by any branch of the government."

(p. 376-7) "It amounts to no more than saying that it was enacted to take care of an emergency. But an emergency can neither create a power nor excuse a defiance of the limitations upon the powers of the Government. *Ex parte Milligan*, 4 Wall. 2."

The emergency that was under discussion was thus stated in the majority opinion (p. 342):

"The President, stating his efforts to relieve the situation and pointing out that no resources at law were at his disposal for compulsory arbitration to save the commercial disaster, the property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, asked Congress * * * ."

Ex parte Milligan, 4 Wall. 2, 120, 125, 126, in addition to what is quoted in the case just mentioned, also has the following to say, which is pertinent to the instant controversy:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years sought to be avoided * * *

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the damages to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew— the history of the world told

them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the *writ of habeas corpus.*"

"But, it is insisted that the safety of the country in time of war demands that this provision for martial law shall be sustained. If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so."

Block v. *Hirsh*, 256 U. S. 135, was another five to four decision. The majority opinion upheld the Act on the ground of emergency as expressed in the Act itself, but this was an exercise of the police power which Congress has over the District of Columbia and the Territories and not otherwise. (*House* v. *Mayes*, 219 U. S. 270, 281-2; *Civil Rights Cases*, 109 U. S. 3, 19; *Slaughter House Cases*, 16 Wall. 36, 63-4; *U. S.* v. *Dewitt*, 9 Wall. 41, 45.) Of course, public welfare and necessity are the very things which give operative effect to the police power. Except as applied to police power, we believe the majority would have agreed with the very forceful comments in the dissenting opinion, which are too long to quote (pp. 160, 162-6, 168-9).

In a speech by James M. Beck, before the Bar Assn. of Tennessee, 19 Amer. Bar Ass'n Jour. No. 9 (Sept. 1933) 493, 495, it is said:

"that in many cases, as, for example, the emergency measures of the present Congress, the law will be en-

> forced long before a case could reach the Supreme Court, and when the controversy is thus presented to that Court as a *fait accompli*, that the Court will find a way, if at all possible, to accept the legislation, on the theory that it, not being omnipotent, cannot unscramble eggs that have once been scrambled." * * *

That idea is one often heard, but we do not agree with it. We think the Court will demonstrate that while eggs cannot be unscrambled, yet, to still speak in culinary terms, garbage can be thrown out before, by its putrefaction, it destroys the whole national edifice and brings sickness and destruction to all the dwellers therein.

Further remarks by Mr. Beck in that same speech, (pp. 498, 540) flash a warning which ought to be heeded. They are as follows:

> "Of all constitutional heresies, the worst, as it seems to me, is the theory that in case of an emergency the Constitution is non-existent for the time being. This doctrine has been the wooden horse, under cover of which the citadel of the Constitution has been taken, for of the Constitution it can now be said: *'Illium fuit.'* * * *.
>
> "The people live in the day, forgetful of yesterday, and indifferent to the morrow. With such a spirit, no constitution can possibly survive. * * *
>
> "We must not let this elemental storm blind our vision. Let us hope and pray—however dark the present prospect is—that the Constitution of the fathers, when this storm of economic disaster has passed away, may again be seen standing as before, upon its foundations of eternal granite, liberty and justice. With me, as the shadows of life lengthen, this hope is only a pious wish—not a conviction. It is only a hope and not a conviction because I can see no evidence that the American people are now influenced by the spirit of constitutional morality, without which no written constitution can possibly endure. * * *

"The present generation of Americans are such invincible pragmatics that they are only concerned with the immediate advantages of a given policy and not with the questions of fundamental and permanent importance. They follow gladly any policy that promises an immediate advantage. * * *

"Let a dulcet flute sound the notes of renewed prosperity and all classes follow as little children, unconscious of the fact that in seeking temporary advantage, they are destroying the fundamental principles of the noblest government that has yet been devised by the wit of man.

"All we can do is to hope and pray that there will some day come a rebirth of the old spirit of ordered liberty, for unless it comes, not only will the Constitution perish in everything except in form, but the Union itself may not survive the destruction of its fundamental law. * * *"

We cannot agree with Mr. Beck in his gloomy outlook for the future. His fears would be well grounded except for one thing. The Supreme Court is a forceful living thing, designed to guard the constitution, and through it the country, from the evils feared, in spite of indifference or delusion of the people and congressional and executive disregard of duty.

The *Legal Tender Cases* do not establish the validity of the enactment now under attack because they do not apply to the facts, and, even were it otherwise, should be disregarded because of the peculiar circumstances under which they were decided. Regardless of everything that has been said about that decision, we still have nothing except a five to four decision in *Legal Tender Cases,* 79 U. S. 457, purporting to repudiate the principles of law established by a five to three decision in *Hepburn* v. *Griswold,* 75 U. S. 603. If a five to four majority was not bound by a former five to three decision, then the Supreme Court now would

not be bound by the five to four decision. Especially would this be so if the five to four decision proves upon examination to have been based upon principles of law which have since been abandoned and repudiated,—and that is just what has occurred. The majority decision in the *Legal Tender Cases* was obviously based upon arguments and reasons of expediency. In that situation, it is not strange that some of the legal principles announced by the majority have since been abandoned. Such an abandoned principle is that the inhibition of the Fifth Amendment in question here applies only to a direct taking and not to consequential injuries resulting from the exercise of lawful power. (*Legal Tender Cases,* 79 U. S. 457, 551). This theory has been abandoned in later cases holding that where the value of a man's land, or a substantial portion of such value, is destroyed by the backing up of water caused by the lawful erection of a dam under government authority on the lands of another, the man whose lands are overflowed or interfered with, although there is no seizure of possession or change of title, but only a consequential and indirect destruction or impairment of value by a lawful act of the government, may recover just compensation under the Fifth Amendment to the same extent as though there had been a direct taking.

U. S. v. *Lynah,* 188 U. S. 445, 468, 471, 474.
U. S. v. *Cress,* 243 U. S. 316, 319-20, 326.
Pumpelly v. Green Bay Co., 13 Wall. (80 U. S.) 166, 177-8.

Even if we take notice that the true purpose of the Act complained of was to take money from ex-soldiers and their dependents in order to help pay the wages of numerous unemployed individuals who would be given jobs on extensive tree-planting or other public projects, thus lessening unemployment and seeking by reckless and wasteful

public expenditures upon various visionary or useless undertakings to lift the country out of the depression into which it had been plunged by previous reckless and wasteful public expenditures, we have but a case of taking money from one man to give it to another, and the taking of private property for private use without just compensation is just as much a violation of the constitution and of natural right as a similar taking for public use. In a case where a judgment in a condemnation proceeding awarding $1 found by a jury to be the value of the property taken, was held violative of the Fifth Amendment, it was said:

> "The requirement that the property taken shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' * * * The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. * * * The mere form of the proceeding instituted against the owner, * * * cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. * * * No court, he said, would hesitate to adjudge void any statute declaring that 'the homestead now owned by A should no longer be his, but should henceforth be the property of B.' In accordance with these principles it was held, in that case, that the property of the citizen could not be taken, under the power of taxation to promote private objects, and, therefore, that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the object was a private, not a public one. * * *

> In the early case of *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In *Sinnickson* v. *Johnson*, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; * * * and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its state constitution.'"
>
> *C., B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 236-8.

It is unnecessary to deny that Congress could withdraw the consent of the United States to be sued on war risk insurance contracts by an act devoted to the single purpose of such withdrawal, although even in that event some other method of ascertaining and performing such obligations of the United States would probably have to be provided. Congress did not merely withdraw consent to suit, but that withdrawal is a mere incident, by implication alone, to a seizure and confiscation of the contract obligations of the United States in order to maintain its financial credit, regardless of how reprehensible such a course may be, or how destructive of its honor and moral credit, and it is not to be presumed that Congress would have enacted a withdrawal of consent to suit, if it had known the remainder of the Act was void. Without such presumption a part only of the Act cannot be sustained, as will be shown in part III of this argument.

Dorchy v. *Kansas*, 264 U. S. 286, 289-90, 291.
Employers' Liab. Cases, 207 U. S. 463, 501-2.

Butts v. *Mer. T. Co.*, 230 U. S. 126, 132, 133.
Utah P. & L. Co. v. *Pfort*, 286 U. S. 165, 184-5.
Sage v. *Baldwin*, 55 F. (2d) 968, 970.
The People v. *McBride*, 234 Ill. 146, 165-6; 84 N. E. 865.
State v. *Cumberland Club*, 136 Tenn. 84, 101; 188 S. W. 583, 587.

It must be that on the impulse of the moment Congress and the President, without realizing fully the effect of the Act in question on the insurance contracts of the United States with its ex-soldiers, have been induced to enact something which, if allowed to stand, will hold the nation up to shame before all the world as one whose most solemn and sacred pledges mean nothing and which is utterly faithless to its most sacred obligations. To save the nation from the justly merited contempt of all men and nations, there now remains nothing but the power of the Court to declare this vicious enactment void. This is very plain speaking, but it is a situation that calls for plain speaking, and the statements herein as to the dishonor and disgrace to the nation in allowing the Act complained of to stand, are mild in comparison with comments made by prominent men with respect to the mere suggestion that the United States might repudiate certain other obligations of less sanctity than those to ex-soldiers who have risked their lives and health in their country's service. Note the following by John Jay, President of Congress and later Chief Justice of the Supreme Court:

> "The pride of America revolts from the idea; her citizens know for what purposes these emissions were made, and have repeatedly plighted their faith for the redemption of them; they are to be found in every man's possession, and every man is interested in their being redeemed; they must, therefore, entertain a high opinion of American credulity who suppose the

people capable of believing, on due reflection, that all America will, against the faith, the honor, and the interest of all America, be ever prevailed upon to countenance, support, or permit so ruinous, so disgraceful a measure. We are convinced that the efforts and arts of our enemies will not be wanting to draw us into this humiliating and contemptible situation. Impelled by malice and the suggestions of chagrin and disappointment at not being able to bend our necks to the yoke, they will endeavor to force or seduce us to commit this unpardonable sin in order to subject us to the punishment due to it, and that we may thenceforth be a reproach and a byword among the nations. Apprised of these consequences, knowing the value of national character, and impressed with a due sense of the immutable laws of justice and honor, it is impossible that America should think without horror of such an execrable deed."

5 Journals of Congress 351 (See 1 Flander's Lives and Times of the Chief Justices 256).

"I am not willing to admit that the Constitution, the boast and glory of our country, would sanction or permit any such legislation. Repudiation in any form, or to any extent, would be dishonor, and for the commission of this public crime no warrant, in my judgment, can ever be found in that instrument."

Legal Tender Cases, 79 U. S. 457, 674 (Field, J., dissenting).

The theory of the District Court, not adopted by the Court of Appeals, that the statute of limitations justifies the sustaining of the demurrer, is unsound, because in an action at law the defense of limitations can be availed of by plea only, not by demurrer.

Wall v. *C. & O. R. Co.*, 200 Ill. 66, 67-8; 65 N. E. 632.

Even were it otherwise, the amended date of beginning of total permanent disability, as shown by the opinion of

the Court of Appeals (R 22), was within the ten-year limitation period. Even under the petition before amendment such date was alleged under a videlicet and the petition shows that the premiums were paid out of decedent's pay as a soldier until his discharge from the army, March 31, 1919, which kept his insurance in force to May 1, 1919, and the allegation of the disability date under a videlicet was sufficient as an allegation of any date within the statute of limitations while the insurance was in force and therefore on the face of the petition the statute had not run.

Collins v. *San. Dist.*, 270 Ill. 108, 111; 110 N. E. 318.

T., P. & W. Ry. Co. v. *McClannon*, 41 Ill. 238, 240-1.

In this respect the instant case differs from *Lynch* v. *U. S.*, 67 F. (2d) 490, which has been distinguished in somewhat similar manner in a district court case which also holds the enactment now in question unconstitutional as a violation of the Fifth Amendment.

Harris v. *U. S.*, 5 F. Supp. 368.

III.

Unconstitutional Delegation of Legislative Powers.

Title I, of the Economy Act is also void as an unconstitutional delegation of legislative powers to the executive department, contrary to Section 1, Article I, of the constitution. This delegation is found mainly in the pension and compensation features of the Act and other matters not embraced within war risk insurance, but petitioner has a right to raise the constitutional question because he is adversely affected by a portion of the Act and it cannot be sustained in part, for it cannot be certain that Congress

would have enacted the portion affecting petitioner if it had known that the other portions were void, and a mere possibility or doubt will not be sufficient to uphold it in part, as the court cannot exercise the legislative powers and discretion of Congress. In such case the burden is on those seeking to uphold the remaining portion to show it would have been enacted alone.

In a statute where Section 28 provided that if any portion of the act should be held void, the remaining portions should be held valid, it was said:

> "But a provision inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the Act and held bad should fall. * * * Section 28 of the Act, * * * provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command. * * * So far as appears, the state court has not passed upon the question whether Section 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment * * * should be vacated."
>
> *Dorchy* v. *Kansas*, 264 U. S. 286, 289-90, 291.

> "even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. * * * As the Act * * * relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, * * * we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. On this subject the opinion in the *Trade-Mark Cases*, 100 U. S. 82, where an Act of Congress concern-

ing trade marks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The court said: (p. 99) 'If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade mark law which is only partial in its operation'."

Employer's Liab. Cases, 207 U. S. 463, 501-2.

"In the absence of a legislative declaration the legal presumption is that an act is to be effective in its entirety, since there is no right of mutilation and a court will not resort to elimination."

Sage v. *Baldwin*, 55 F. (2d) 968, 970.

To the same effect are

Butts v. *Mer. T. Co.*, 230 U. S. 126, 132, 133.
Utah P. & L. Co. v. *Pfort*, 286 U. S. 165, 184-5.
The People v. *McBride*, 234 Ill. 146, 165-6.
State v. *Cumberland Club*, 136 Tenn. 84, 101; 188 S. W. 583, 587.

The Act in question shows a comprehensive scheme to cut down payments to veterans of all wars subsequent to the Civil War by way of pension, disability compensation, disability allowance, medical and hospital treatment and domiciliary care and the portion with respect to insurance seems to be thrown in merely as an incident to the general plan and to make insurance beneficiaries suffer a loss, as well as veterans theretofore entitled to other benefits, and it is not to be presumed that Congress would have enacted the portion concerning insurance independently of the other portion.

The Court of Appeals errs in supposing that the Economy Act delegates to anybody the right to pass upon war risk insurance claims that had not been allowed or dis-

allowed prior to March 20, 1933, for such right is entirely abolished by that Act, although the Court of Appeals is right in deciding that the duty of passing upon claims against the United States may be delegated to administrative bodies or officials. This is so because such functions are fact-finding ones, not involving the exercise of discretion. The allowance of pensions may be delegated, just as other discretionary powers may be given to an official of the executive department in the administration of other laws enacted by Congress, but in such cases the primary standards for such allowances or the exercise of such discretionary powers must be fixed by Congress and not left to the unguided discretion of the officials in question.

It has been held that the Act of Congress enacted during the world war prohibiting the charging of unreasonable prices for various foodstuffs and other commodities was unconstitutional and void because it failed to fix the standard by which the reasonableness could be determined and thus constituted a delegation of legislative authority to the courts and juries who would be called upon to try the cases involving alleged violations of the Act.

U. S. v. *Cohen G. Co.*, 255 U. S. 81, 89-91, 92-3.

> "To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do as they might desire, is false reasoning. * * * Congress cannot transfer its legislative powers to the States—by nature this is non-delegable."
>
> *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164.

> "That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will, and after fixing a primary standard, de-

volve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."

U. S. v. *Shreveport G. & E. Co.*, 287 U. S. 77, 85.

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

Field v. *Clark*, 143 U. S. 649, 692-4.

Other cases illustrative of what is and what is not a fixing of the primary standards, and the necessity of doing so, are

Louisville B. Co. v. U. S., 242 U. S. 409, 424-5.
I. C. C. v. *Goodrich T. Co.*, 224 U. S. 194, 214, 215.
U. S. v. *Chi., etc. R. Co.*, 282 U. S. 311, 324.
Buttfield v. *Stranahan*, 192 U. S. 470, 496.

The objectionable delegation of unlimited discretion in Title I of the Economy Act is to be found in the provisions of Section 1, that certain classes "may" be paid a pension, "subject to such requirements and limitations as shall be contained in regulations to be issued by the President;" of Section 1 (b) that the President may reduce the pension rate "as he may deem proper;" in the fact that no provision requires the allowance of any pension to any class unless the President shall desire to pay it; in the absence of any guide for the discretion of the President in determining the amount of pension within the wide limits of $6 to $275 per month for disability and $12 to $75 per month for death in Section 2; in the provisions of Section 3 authorizing the President to prescribe the "minimum degrees of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension," therefor, without in any way

fixing any rule or principle for designating such minimum and maximum other than the mere whim of the President, and further authorizing the President to prescribe "such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars," but leaving it to his uncontrolled discretion to determine just what shall be just and equitable; in the provisions of Section 4 that the President shall prescribe by regulation the date of beginning and termination of the period in each war, service within which shall be deemed war-time service, in spite of the fact that the wars in question had become history and the facts on that point were as available to Congress as to the President; also in the provisions of Section 4 that the President shall prescribe "by regulation the required number of days of war or peace time service for each class of veterans, the time limit on filing of claims" and "any other requirements as to entitlement as he shall deem equitable and just," thereby leaving it to the President to determine a matter which could have been determined as easily by Congress from facts equally available to both and authorizing the President to enact a statute of limitations. The Section goes on to say that the President "may prescribe different requirements or conditions for the veterans of different wars" and may further subdivide the classes of persons and apply different requirements or conditions to such subdivisions. This, of course, means discrimination between various classes of veterans, not according to any rule fixed by Congress, but according to the whim of the President.

The delegation of legislative powers to the President is not in harmony with the American system of government, and unless we are to abandon the constitutional safeguards and turn our system of government into a social despotism of the nature of that of Soviet Russia or Nazi Germany, a halt upon the current trend of congressional

legislation must be called, and the courts are now the only power which can apply the curb. The argument of the President in seeking these powers of a dictator was that an emergency existed which required it,—an argument which has later given way to the announcement that many of them are to be permanent. However, the emergency could not be greater than that existing in war time and even that will not justify setting aside the constitution. Even if the purpose and intentions of the President are good ones, those of persons under whose influence he acts may be otherwise, or this vast power might be abused by another President whose purposes and intentions might be the reverse, or a President might fail mentally and do untold damage by the exercise of dictatorial powers before his condition could be sufficiently recognized and before steps could be taken to safeguard the country, and in any event the acts of a legislative body such as Congress would be more deliberate and less likely to be swayed by hysteria, than the acts of any one man. The granting of despotic powers for the accomplishment of a desirable end is the very means by which free governments are usually destroyed.

The idea expressed in respondent's brief in the Court of Appeals that those who framed the Constitution were not afraid of the concentration of power in the executive, is altogether fallacious. True, at that time the President did not have control of the vast amount of patronage at the disposal of modern presidents and for that reason the danger of seizure and exercise by the President of despotic and unconstitutional powers was not so great as at the present day and in early times the greatest danger of usurpation was in Congress, yet the makers of the Constitution had enough foresight to guard against the centering of despotic power and unbridled discretion in any branch of the government, and the means adopted to guard

against this was the constitutional separation of the powers of the three branches of the government. A few quotations will exemplify this:

"But, in my opinion, a yet greater danger threatens the Constitution and the government; and that is from the attempt to extend the power of the executive at the expense of all the other branches of the government, and of the people themselves. Whatever accustomed power is denied to the Constitution, whatever accustomed power is denied to Congress or to the judiciary, none is denied to the executive."

2 Writings and Speeches of Daniel Webster, 107.

"It is important, likewise, that the habits of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way, which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any par-

tial or transient benefit which the use can at any time yield."

Farewell Address, 12 Writings of Washington 226.

"The powers of the departments are not all mixed up in a jumble. They are separate, and are made separate by the Constitution; and have hitherto been kept separate by the practice of the Government. I hope they will continue to be kept separate, for then there is a just responsibility. If every department acts within its own power, it takes the responsibility belonging to its power. But if the powers of two or more departments are mixed up irregularly and jumbled together, there is no just responsibility upon anybody."

14 Writings and Speeches of Daniel Webster 362.

O'Donoghue v. *U. S.*, 289 U. S. 516, 530, is perhaps the most recent pronouncement holding void an act of Congress disregarding the constitutional distribution of governmental powers. That opinion, on such point, was unanimous, for the dissent was on another question. The opinion says:

"The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, * * * namely, to preclude a commingling of these essentially different powers of government in the same hands. And this object is none the less apparent and controlling because there is to be found in the Constitution an occasional specific provision conferring upon a given department certain functions, which, by their nature, would otherwise fall within the general scope of the powers of another. Such exceptions serve rather to emphasize the generally inviolate character of the plan.

If it be important thus to separate the several departments of government and restrict them to the ex-

ercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers' * * * And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' "

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."

James Madison, The Federalist, No. 47, pp. 373-4.

"All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. * * * As little will it avail us that they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free prineiples, but in which the powers of government should be so divided and balanced among several

bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."

Thomas Jefferson, Notes on the State of Virginia, 195; quoted by *James Madison, The Federalist,* No. 48, p. 385.

There is daily becoming more and more apparent to the sound and substantial legal minds of the country, the danger to our very existence threatened by the disregard of the constitutional separation of governmental powers and other unconstitutional enactments of the 73rd Congress and the usurpation of powers by the executive in accordance with, and even beyond the scope of, such unconstitutional enactments. For instance, at the annual meeting of the American Bar Association only a few months ago Senator Patrick A. McCarran delivered an address on "The Growth of Federal Executive Power," which the editors of the Association's Journal thought of such importance as to be published in full. It touches upon unconstitutional delegation and usurpation of powers and also upon other questions involved in the mass of recent legislation and ought to be read with interest even without its particular application to the case at bar.

19 Am. Bar Assn. Journal, No. 10, Oct., 1933, p. 587.

Especially pertinent extracts from that address, the first of which refers to Andrew Jackson, are as follows (pp. 589-90):

"In this Administration, we find the Executive exercising monarchial power in the name of the Law; and,

here, we find the first open declaration by the Executive of the assumption on his part of powers and prerogatives, feared and conjectured by Jefferson and sought to be guarded against by Jefferson adherents, by the very language used in the Organic Law itself. * * *

Here we find the office of the newly elected Warrior President treated as if it were a captured fortress. The will of the new Executive became the law, all existing theories were subordinate to that will. * * * He forced laws upon Congress. He took the public purse from the custody of Congress, * * *

The expansion of the Executive, arbitrary and dictatorial as it was under Jackson, was productive of spontaneous expressions not at all out of line with those that have been made, by reason of subsequent acquisitions by the Executive. We find Clay expressing himself thus: 'We are in the midst of a revolution, hitherto bloodless, but rapidly tending toward a total change of the pure, republican character of the government and to the concentration of all power in the hands of one man. The powers of Congress are paralyzed, except when exerted in conformity with his will. * * * In a term of eight years, a little more than equal to that which was required to establish our liberties, the Government will have been transformed into an elective monarchy—the worst of all forms of government.'

In Jackson's dominant attitude, manifesting a total disregard for Constitutional limitations, we find the expansion of the Executive coming into our form of government by leaps and bounds. * * *

But, through all of this and from all of this, there developed the establishment of new and unthought-of kingly powers. And, while the people played and laughed, a new form of Government was being slowly crystallized, a form of Government dictatorial and dominating, threatening the very liberties of those who unmindfully witnessed their formation, and awakening dead voices that struggled through seven

years of Revolutionary turmoil to throw off the yoke of a limited monarchy."

then, coming down to the present (p. 592):

"* * * and we can hearken to the spirit of Jefferson, repeating the words of the great author where he said: 'Were we directed from Washington when to sow and when to reap, we should soon want bread.'

Assuming that these great powers, surrendered by the people into the hands of the Executive, rest today on the shoulders of a friendly, far-sighted, clear-thinking individual, what does that prophesy for the future? When will we have another Jackson, another Johnson?

Moreover, these codes, rules and regulations, and the powers conferred on the Executive by the recent legislation, are not made or enforced by the Executive—such would be a human, physical impossibility. These codes and regulations are made and enforced by individuals never chosen by the people, never confirmed by the Senate of the United States. However zealous their application, however lofty their motives, they are, nevertheless, removed and remote from the Governing Power. * * *

The expansion of the Executive, as it exists today, is not a spontaneous thing. * * * * Unheeding, the majority of the people have gone on through successive steps in this growth, until today the awakening comes, when a new form of Government is found seated on the throne of Democracy.

An unrestricted monarchy once asserted its will in Great Britain. The voice of the people was a wee, small whisper in the wind. Today, that Monarch, though still invested with power, dares not assert it. The veto power, still lodged in the hands of the King, has not been asserted in nearly a century. The doors of the Bastile swung on quiet hinges, but they were battered down with tumult. The people slumber, while processes go on. But, if this giant creature awakens and calls for its former rights, its thundering cries may shake the World.

I firmly believe that the judgment of the people of this country will be exercised before the time comes that, through the expansion of the arbitrary powers in the Executive, brings us to a fall. What we may fear is the revolutionary turn which a liberty-loving people may take, when they realize that their rights and liberties have been shorn from them.

The Road Back may be more destructive than the avenue forward. This is an hour for the revival of faith, the faith of the Fathers. This is an hour for us here assembled, as the representatives of the mass concept of the law, to lend our whole beings, so that our Nation, founded under God, shall go on for Humanity."

What has just been quoted gives rise to serious thought. It is apparent that the legislative branch of our government is almost wholly under the domination of the executive, leaving the judicial branch as the only guardian and protector of the constitutional rights of the people. We believe that the judiciary will be courageous enough and independent enough to vindicate the constitution and to confine the executive department to its constitutional powers before the judicial department also becomes dominated by the expanding powers of the executive.

One man, be his intentions ever so good and his ability ever so great, will never be able, with the little time at his disposal, to investigate and duly consider all phases of the situation involved in such legislation, but must depend on the advice and information furnished by various underlings or volunteers. These will not be the persons to whom the people have entrusted the power to legislate and many of them may be more or less ignorant or actuated by a desire to make the legislation accord with some pet hobby of their own, or with the selfish wishes of those by whom they are controlled or vent their spite on some class of citizens towards whom they are ill-disposed.

The Act now under attack is an illustration of this. It is incredible that, with full cognizance of the facts and opportunity for due deliberation, the President would have brought upon the country the shame and reproach of repudiating its contract obligations to its citizens who have risked their health and lives in fighting for their country upon its battlefields and who have bought with a substantial portion of their meager soldier's pay the contracts now repudiated and have been induced to buy those contracts under the seemingly fair and reasonable assurance that thereby they were securing themselves in case of total permanent disability, and their dependents in case of death, against pauperism and assuring to themselves and their loved ones, funds for support rightfully theirs and not charity. It would seem that the destruction by the Act in question of the insurance rights of these ex-soldiers must have been inserted in the Act as a result of the efforts of some adviser of the President, actuated by a spirit of vindictive hatred against war veterans or a desire to cut down the surtax of his wealthy patrons or friends by shifting the burden of support of war veterans from the national government to smaller taxpayers of the states.

An unworthy mercenary spirit is shown in the Act in question in discriminating between yearly renewable term insurance, which is bringing in no further premiums, and converted insurance, premiums on most of which are a present source of government income. As there is no further income from the former, it is destroyed, but as converted insurance is still in force and there are many ex-soldiers who can still be exploited through payment of premiums under the delusion that their country's solemn promises mean something and will be kept, converted insurance has not yet been touched by the statutory blight.

What has been said about the necessity of the President relying upon underlings who are sometimes ignorant, in-

stead of giving the matter his individual attention, is well illustrated by the executive order known as Veterans Regulation No. 8, issued March 31, 1933, under the Act in question, and published by the Government Printing Office in a pamphlet entitled "Veterans' Administration, Public No. 2, 73rd Congress, and executive orders issued pursuant thereto, governing the granting of benefits to veterans of the armed forces of the United States and their dependents," (pp. 20-1). Surely the President, if personally responsible for this regulation, would have informed himself of the nature of automatic insurance and would not have fallen into the palpable error of confusing automatic insurance with yearly renewable term insurance and treating the former as included in the latter. That error must have resulted from the ignorance of some underling or the vindictive spirit of some adviser seeking to still further injure ex-soldiers and take from some of them something without any shadow of legal authority. Automatic insurance is not mentioned in the Act of March 20, 1933, and has no characteristic of yearly renewable term insurance. Such automatic insurance is neither yearly nor renewable because, by the very terms of the Act creating it, it must have either matured or expired in less than a year. It was intended merely as additional pay for the services of soldiers who, while in military service, became totally and permanently disabled or died, without having applied for war risk insurance within the period, much less than a year, specified in the Act creating it, which is in part, as follows:

> "Any person in the active service on or after the 6th day of April, 1917, and before the 11th day of November, 1918, who, while in such service, and before the expiration of 120 days after October 15, 1917, or 120 days after entrance into or employment in the active service, becomes or has become totally and permanently disabled, or dies or has died, without having applied for insurance, shall be deemed to have applied

for and to have been granted insurance, payable to such person during his life in monthly installments of $25 each;"

Sec. 401, *War Risk Insurance Act*. 1919 Supp. Fed. Stat. Ann. 388; 41 Stat. 374.

Notwithstanding this, said Veterans Regulation No. 8, Parts III, IV and V, uses the words "yearly renewable term insurance (including automatic insurance)" and attempts to repudiate, under alleged authority of said Act of March 20, 1933, all of such automatic insurance.

Another illustration of the desire to seize further arbitrary and despotic power under the Act in question, but beyond its limits, is found in executive order Veterans Regulation No. 4, concerning protected awards, published with said Act of March 20, 1933. Section 17 of said Act protects awards, *first*, by providing, after repealing all grants of compensation and other allowances, "but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted," thereby protecting all awards against reduction or cancellation until the end of June, 1933, and *second*, by providing that "the provisions of this title shall not apply to compensation or pension (except as to rates, time of entry into active service and special statutory allowances), being paid to veterans disabled, or dependents of veterans who died, as the result of disease or injury directly connected with active military or naval service (without benefit of statutory or regulatory presumption of service connection) pursuant to the provisions of the laws in effect on the date of the enactment of this Act," thereby creating another class of protected awards. Now, said Veterans Regulation No. 4, in addition to properly providing that the provisions of Title I of the Act shall not be applicable to any claim wherein compensation or pension is being paid based on a finding

heretofore made pursuant to law that the injury or disease causing disability or death was directly connected with active military or naval service, also improperly provides that "the protection afforded by Section 17 is not applicable to any claim wherein the injury or disease causing disability or death has been connected with active military or naval service by virtue of any statutory or regulatory presumption of service connection," thereby arbitrarily and illegally cutting off, prior to July 1, 1933, payments of awards based on a presumption of service connection, which said Section 17 says shall not be cut off prior to the latter date.

These two instances are but illustrations of the fact that when legislative and administrative powers are combined in one individual or body of persons, a despotism is created under which unjust laws will be enacted and will be enforced in an unjust and despotic manner. The Act of March 20, 1933, if allowed to stand, brings to the nation the shame and disgrace of repudiation of its solemn obligations and promises to those as to whom such promises should ever be held sacred, a repudiation of which the least honorable civilized nation in the world would scorn to be guilty. To save the country from such shame and disgrace is one of the very purposes for which the Constitution was adopted and for which the separation of legislative, executive and judicial functions was thereby made mandatory. When the legislative and executive departments have failed to protect the country and its citizens against such a situation, there is still another constitutional power established to act as a check and safeguard, the judicial department, and the time has now come for the judicial department to exercise its highest function and save the country from the shame, reproach and disgrace with which it is threatened and save from pauperism a large body of our citizens by preserving for them

the rights and resources which their country solemnly promised to place at their disposal.

It is impossible to close one's eyes to the fact that the Act under consideration and many of the flood of congressional enactments which have been sought and obtained from the recent Congress, giving the President extensive arbitrary powers, constitute an utter disregard of the Constitution. A prominent Englishman has publicly congratulated us on getting rid of our Constitution. It has also been said that we ought to do away with the Constitution,— that it is antiquated and altogether unsuited to present conditions. If such ideas are sound, then, of course, our system is all wrong and the sooner we get rid of it and concentrate all the powers and functions of government, legislative, executive and judicial, in a single dictator, the better. However, for nearly a century and a half the country has grown and prospered, and even in times of depression has been in better condition than any other country in the world, under the Constitution so assailed. The very purpose of the Constitution was to give stability to our government and institutions and guard against the destructive effects of hysteria and visionary cure-alls.

The futility of these ill-considered measures and the fact that unjust encroachment upon private rights is only the beginning of a long series of other repetitions was pointed out by James Madison almost a century and a half ago in language so prophetic and appropriate that it almost seems to have been written with present conditions in mind:

> "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to

the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

James Madison, The Federalist, No. 44, p. 351, Jan. 25, 1788.

We of the legal profession, at least,— all of us as members of the bar and some of us as members of the bench,— have taken a solemn oath to uphold the Constitution and, unless that oath was a mere empty and meaningless formula, owe a duty to protect and guard the country from every infringement and attack upon the Constitution until and unless it shall be modified in the manner provided in the Constitution itself.

CONCLUSION.

The instant case affects not only, directly, the rights of the many thousands of war veterans and beneficiaries whose matured insurance claims had not been administratively decided prior to March 20, 1933, but also, indirectly, almost every citizen, in that it involves questions, woven into the fabric of much of the recent federal legislation, of taking private property for public use without just compensation and without due process of law, and of delegation of uncontrolled, unlimited and despotic discretionary powers to the executive to regulate the affairs of nearly everybody. When the legislative and executive departments join in a violation of the constitution, the Supreme Court is the last resort for the upholding of the rights of the citizen and the preservation of the constitution, and we pray that as a means to that end the judgment under review be reversed and the cause be remanded.

Respectfully submitted,

EDWARD H. S. MARTIN,
Attorney for Petitioner.

APPENDIX.

Economy Act, March 20, 1933, c. 3, Secs. 1, 2, 3, 4, 5, 17, Title I, 48 Stat. 11, Secs. 701, 702, 703, 704, 705, 717, ch. 12, Tit. 38 Pocket Supp. U.S.C.A.:

SECTION 1. That subject to such requirements and limitations as shall be contained in regulations to be issued by the President, and within the limits of appropriations made by Congress, the following classes of persons may be paid a pension:

(a) Any person who served in the active military or naval service and who is disabled as a result of disease or injury or aggravation of a preexisting disease or injury incurred in line of duty in such service.

(b) Any person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, or the World War, and who is permanently disabled as a result of injury or disease; *Provided,* That nothing contained in this title shall deny a pension to a Spanish-American War veteran past the age of sixty-two years entitled to a pension under existing law, but the President may reduce the rate of pension as he may deem proper.

(c) The widow, child, or children, dependent mother or father, of any person who dies as a result of disease or injury incurred or aggravated in line of duty in the active military or naval service.

(d) The widow and/or child of any deceased person who served in the active military or naval service during the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection.

(e) For the purpose of subparagraph (b) of this section, the World War shall be deemed to have ended November 11, 1918.

SECTION 2. The minimum and maximum monthly rate of pension which may be paid for disability or death shall be as follows: For disability, from $6 to $275; for death, from $12 to $75.

SECTION 3. For each class of persons specified in subparagraphs (a) and (b) of section 1 of this title the President is hereby authorized to prescribe by regulation the minimum degrees of disability and such higher degrees of disability, if any, as in his judgment should be recognized and prescribe the rate of pension payable for each such degree of disability. In fixing rates of pensions for disability or death the President shall prescribe by regulation such differentiation as he may deem just and equitable, in the rates to be paid to veterans of different wars and/or their dependents and to be paid for

(a) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in war-time service;

(b) Disabilities and deaths resulting from disease or injury incurred or aggravated in line of duty in peace-time service;

(c) Disabilities and deaths not incurred in service.

SECTION 4. The President shall prescribe by regulation (subject to the provisions of section 1 (e) of this title) the date of the beginning and of the termination of the period in each war subsequent to the Civil War, including the Boxer Rebellion and the Philippine Insurrection, service within which shall for the purposes of this Act be deemed war-time service. The President shall further prescribe by regulation the required number of days of war or peace time service for each class of veterans, the

time limit on filing of claims for each class of veterans and their dependents, the nature and extent of proofs and presumptions for such different classes, and any other requirements as to entitlement as he shall deem equitable and just. The President in establishing conditions precedent may prescribe different requirements or conditions for the veterans of different wars and their dependents and may further subdivide the classes of persons as outlined in section 1 of this title and apply different requirements or conditions to such subdivisions.

SECTION 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

SECTION 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * * Provided, that nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this chapter and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance or which may hereafter be rendered in any such suit now pending: * * *

World War Veterans' Act, 1924, as amended July 3, 1930, c. 849, Sec. 4, 46 Stat. 992, Sec. 445, Ch. 10, Tit. 38, Pocket Supp. U.S.C.A.:

In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against

the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *

No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, * * * *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * * No State or other statute of limitations shall be applicable to suits filed under this section. * * *

The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. This section, as amended, with the exception of this paragraph, shall apply to all suits now pending against the United States under the provisions of the War Risk Insurance Act, as amended, or this chapter.

Executive Order, Veterans Regulation No. 4. * * *

I. The provisions of Title I, Public 2, 73rd Congress, and the Regulations issued pursuant thereto shall not be applicable to any claim wherein compensation or pension is being paid based on a finding heretofore made pursuant to law that the injury or disease causing disability or death was directly connected with active military or naval service, except where under the provisions of Title I, Pub-

lic 2, 73rd Congress and Regulations issued pursuant thereto the rate of disability or requirement as to time of entry into active service has been changed or payment is based on a statutory allowance. The protection afforded by Section 17 is not applicable to any claim wherein the injury or disease causing disability or death has been connected with active military or naval service by virtue of any statutory or regulatory presumption of service connection. * * *

Veterans Regulation No. 8. * * *

III. Payments under contracts of yearly renewable term insurance (including automatic insurance) which have matured, and under which payments have been commenced prior to March 20, 1933, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance (including automatic insurance), or which may hereafter be rendered in any such suit pending in court on March 20, 1933, may hereafter be made.

IV. Further payment of benefits on account of the death of an insured to whom yearly renewable term insurance (including automatic insurance) benefits have been awarded and are being paid in accordance with paragraph III of this regulation shall be made in accordance with the World War Veterans' Act, 1924, as amended, and precedents in effect thereunder.

V. Except as stated above, no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims or claims hereafter filed for such benefits shall be disallowed.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	8
Appendix (statutes and regulations)	9, 10

CITATIONS

Cases:	
Beers v. *Arkansas*, 20 How. 527	5
Crouch v. *United States*, 266 U.S. 180; 8 F. (2d) 435	7
DeGroot v. *United States*, 5 Wall. 419	5
Gordon v. *United States*, 7 Wall. 188	5
Graham & Foster v. *Goodcell*, 282 U.S. 409	5
Hans v. *Louisiana*, 134 U.S. 1	5
Harris v. *United States*, 5 F.Supp. 368	7
Illinois Central R.R. Co. v. *Public Utilities Commission*, 245 U.S. 493	5
Johnson v. *Emergency Fleet Corporation*, 280 U.S. 320	5
Kansas v. *United States*, 204 U.S. 331	5
Kawananakoa v. *Polyblank*, 205 U.S. 349	5
Lynch v. *United States*, 67 F. (2d) 490, No. 855, October term, 1933	7
Price v. *United States*, 174 U.S. 373	5
Schillinger v. *United States*, 155 U.S. 163	5
United States v. *Babcock*, 250 U.S. 328	5
United States v. *Clarke*, 8 Pet. 436	5
United States v. *Eckford*, 6 Wall. 484	5
United States v. *Guthrie*, 17 How. 284	5
United States v. *Heinszen & Co.*, 206 U.S. 370	5
United States v. *McGovern*, 299 Fed. 302, appeal dismissed, 267 U.S. 608	7
United States v. *Pfitsch*, 256 U.S. 547	7
White v. *United States*, 270 U.S. 175	6
Statutes:	
Act of October 6, 1917, c. 105, 40 Stat. 398	2
Act of March 20, 1933, c. 3, 48 Stat. 8, Secs. 5 and 17	9
World War Veterans' Act, 1924, Sec. 19, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, Sec. 4	9
Judicial Code, Sec. 24 (20) (U.S.C., Title 28, Sec. 41 (20))	7
Independent Offices Appropriation Act, 1935 (Mar. 28, 1934), Pub., No. 141, 73d Cong.	7
Regulations:	
Veterans' Regulation No. 8, Par. V	10

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 861

SAM WILNER, IN HIS OWN RIGHT AND AS ADMINISTRATOR of the Estate of Meyer Wilner, Deceased, petitioner

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered a memorandum opinion (R. 8–12) which is unreported. The opinion of the Circuit Court of Appeals (R. 21–26) is reported in 68 F. (2d) 442.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 12, 1934. (R. 26.) The petition for a writ of certiorari was filed March 14, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Sections 5 and 17 of the Economy Act of March 20, 1933, c. 3, 48 Stat. 8, 9, 11, validly deprived the courts below of jurisdiction to entertain a suit against the United States on a contract of yearly renewable term insurance issued under the War Risk Insurance Act of 1917 (Act of October 6, 1917, c. 105, 40 Stat. 398).

STATUTES INVOLVED

These are set forth in the Appendix, *infra*, p. 9.

STATEMENT

The petitioner commenced this suit in the District Court April 28, 1933 (R. 2), in his own right and as administrator of the estate of Meyer Wilner, deceased, to recover total permanent disability and death benefits alleged to be due under a contract of yearly renewable term insurance issued to Meyer Wilner during service in the United States Army between September 19, 1917, and March 31, 1919. (R. 1–6.) Meyer Wilner died intestate May 15, 1929. (R. 2.)

The petition as amended (R. 12) alleged further: that the insured became totally and permanently disabled on April 15, 1919 (R. 4); that a demand for insurance benefits was made by the insured November 15, 1928, and by the petitioner May 17, 1929 (R. 4); that no decision was reached by the Veterans' Administration until April 7, 1933; that then

the petitioner was informed that by reason of Section 17 of the Act of March 20, 1933, the Veterans' Administration was without authority to take any action on the claim (R. 5). The petition alleged that the said Act was unconstitutional and void as an attempted delegation to the President of legislative powers contrary to Section 1, Article I of the Constitution, and also that it deprived petitioner of property without due process of law contrary to the Fifth Amendment. (R. 5.)

The respondent filed a general demurrer to the petition (R. 7) which was sustained by the District Court (R. 8–12) and the suit dismissed with costs for want of jurisdiction (R. 13). The Circuit Court of Appeals reversed as to the costs, and directed a dismissal for want of jurisdiction without costs. (R. 21–26.)

ARGUMENT

I

Jurisdiction was refused below because of Sections 5 and 17 of the Economy Act of March 20, 1933, *infra*, pp. 9–10. The effect of the Act upon existing unconverted yearly renewable term insurance contracts [1] is twofold:

[1] Such insurance should not be confused with the permanent converted insurance policies issued subsequently to the war to veterans who elected to convert their temporary war-time insurance into a permanent form of Government insurance. The Act of March 20, 1933, does not affect the latter form of insurance.

(1) By Section 17 all laws granting or relating to such insurance are repealed, and no new payments under such insurance may be made, except (in substance) upon claims matured before the Act and on which payments had been started, or which were at that date in litigation. The repeal includes the Act under which suits on such policies have hitherto been brought in District Courts. World War Veterans Act, 1924, Sec. 19, as amended by Act of July 3, 1930, c. 849, 46 Stat. 991, 992, Sec. 4, *infra*, p. 9.

(2) By Section 5 the decisions of the Administrator of Veterans' Affairs are made "final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

The claims of the petitioner and his decedent did not fall within the saving clause of Section 17, since they had neither been approved nor sued on by March 20, 1933. They were, therefore, denied by the Administrator of Veterans' Affairs under that section. (R. 5.) Jurisdiction was refused below under both sections. (R. 9–10, 23–24.)

That this is the meaning of the Act is clear. The question is as to its validity as here applied. The suit below was against the United States, directly. It claimed a money judgment. (R. 6.) Prior to 1933 the Congress had consented to such actions. World War Veterans Act, 1924, Sec. 19, as amended, *infra*, p. 9. That consent is now

withdrawn. Congress clearly had the power to withdraw it. *United States* v. *Clarke*, 8 Peters 436, 444; *United States* v. *Guthrie*, 17 How. 284; *Beers* v. *Arkansas*, 20 How. 527; *DeGroot* v. *United States*, 5 Wall. 419, 431–433; *United States* v. *Eckford*, 6 Wall. 484, 487–491; *Gordon* v. *United States*, 7 Wall. 188, 195; *Hans* v. *Louisiana*, 134 U.S. 1; *Schillinger* v. *United States*, 155 U.S. 163; *Price* v. *United States*, 174 U.S. 373; *Kansas* v. *United States*, 204 U.S. 331, 341; *Kawananakoa* v. *Polyblank*, 205 U.S. 349; *United States* v. *Heinszen & Co.*, 206 U.S. 370, 386–388, 391; *Illinois Central R.R. Co.* v. *Public Utilities Comm'n.*, 245 U.S. 493, 504–505; *United States* v. *Babcock*, 250 U.S. 328, 331; *Johnson* v. *Emergency Fleet Corporation*, 280 U.S. 320.[2]

But it is said the Act not only deprives courts of jurisdiction, but has wholly confiscated plaintiff's rights, by repealing all the laws that grant them. That seems indeed to be the meaning of Section 17, and is so stated in the regulations. Veterans' Regulation No. 8, Par. V, *infra*, p. 10.

---

[2] The reservation on this point, expressed in *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 430–431, was, as we understand it, on the ground that some of the actions there involved were "against the collector individually and were based upon the right to recover as against him by reason of his illegal acts." We do not understand that the Court there intended to cast doubt upon the power of Congress to open or close the courts of the United States, in its discretion, to direct suits for money judgments against the United States as sole defendant.

In *White* v. *United States,* 270 U.S. 175, this Court determined that the rights of beneficiaries under these war risk term contracts were subject to amendment by the Congress. It was there said (p. 180):

> The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. It was a new experiment in which changes might be found necessary, or at least, as in this case, feasible more exactly to carry out his will. If the soldier was willing to put himself into the Government's hands to that extent no one else could complain. * * *

In 1933, more than fourteen years after the Armistice, Congress determined by this Act that no further payments should be made of claims upon term policies which had neither been allowed, nor put in suit, nor converted to permanent Government insurance, before the Act was passed. The reasons for its action are not here important. By the same Act it closed the courts of the United States to further suits upon such claims. Whatever its power was over the contracts, directly, it clearly had the power to close the courts. Having done that before the suit was brought, it follows

that the District Court had no jurisdiction of the case, and both the courts below have properly so held.[3]

The Circuit Court of Appeals for the Fifth Circuit has reached the same result.[4] *Lynch* v. *United States*, 67 F. (2d) 490, petition for certiorari filed March 12, 1934, No. 855.

II

Petitioner insists further that the Act is void because it delegates legislative power to the President. This claim relates not to the provisions concerning yearly renewable term insurance, as to which the Act is wholly definite, but to the provisions as to pensions and other compensation, particularly Sections 1 to 4. It is, however, clear that the petitioner's sole claim is under the yearly renewable term insurance policy on which he sues, and he is not affected by the other sections of the Act.

---

[3] Section 35 of the Independent Offices Appropriation Act, 1935, enacted March 28, 1934, is inapplicable to the present case because it is not one in which "maturity of the insurance contract had been determined by the Veterans' Administration prior to March 20, 1933."

[4] The contrary decision of the District Court for the district of Idaho in *Harris* v. *United States*, 5 F. Supp. 368, is based on the view that suits on war risk policies are brought under the Tucker Act (Judicial Code, Sec. 24 (20), U.S.C., Title 28, Sec. 41 (20)) which, of course, was not repealed by the Economy Act of 1933. But this understanding is erroneous. *United States* v. *Pfitsch*, 256 U.S. 547, 552–553; *Crouch* v. *United States*, 266 U.S. 180, 8 F. (2d) 435; *United States* v. *McGovern*, 299 Fed. 302, appeal dismissed, 267 U.S. 608.

CONCLUSION

The case is admittedly important. But the result below seems clearly right, and agrees with that in the Fifth Circuit. Conflict of decision does not seem likely to arise. The petition should be denied.

J. CRAWFORD BIGGS,
Solicitor General.

WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
RANDOLPH C. SHAW,
CHARLES BUNN,
Special Assistants to the Attorney General.

APRIL 1934.

APPENDIX

STATUTES AND REGULATIONS

Section 19 of the World War Veterans' Act, 1924, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 991, Sec 4:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the Supreme Court of the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies. * * *
>
> * * * * *
>
> The term "claim" as used in this section, means any writing which alleges permanent and total disability at a time when the contract of insurance was in force, or which uses words showing an intention to claim insurance benefits and the term "disagreement" means a denial of the claim by the director or some one acting in his name on an appeal to the director. * * *

Economy Act of March 20, 1933, c. 3, 48 Stat. 8, 9, 11, Secs. 5 and 17:

> Sec. 5. All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title, or the regulations

issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

Sec. 17. * * * all laws granting or pertaining to yearly renewable term insurance are hereby repealed, * * *. *Provided*, That nothing contained in this section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: * * *.

Pursuant to the authority vested by the provisions of the Act of March 20, 1933, *supra*, the President of the United States issued an Executive Order entitled Veterans' Regulation No. 8, paragraph V of said order being as follows:

> Except as stated above, no payments may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims or claims hereafter filed for such benefits shall be disallowed.

U. S. GOVERNMENT PRINTING OFFICE: 1934

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	5

CITATIONS

Case:

Lynch v. *United States*, No. 855, October Term, 1933.... 2, 3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 861

SAM WILNER, IN HIS OWN RIGHT AND AS ADMINISTRATOR of the Estate of Meyer Wilner, deceased, petitioner

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered a memorandum opinion (R. 8–12), which is unreported. The opinion of the Circuit Court of Appeals (R. 21–26) is reported in 68 F. (2d) 442.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 12, 1934. (R. 26.) The petition for a writ of certiorari was filed March 14, 1934, and granted April 9, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 17 of the Economy Act of March 20, 1933, deprived the courts below of jurisdiction to entertain a suit against the United States on a contract of yearly renewable term insurance issued under the War Risk Insurance Act of 1917.

STATUTES INVOLVED

These are set forth in the brief in *Lynch* v. *United States*, No. 855.

STATEMENT

The petitioner commenced this suit in the District Court April 28, 1933 (R. 2), in his own right and as administrator of the estate of Meyer Wilner, deceased, to recover total permanent disability and death benefits alleged to be due under a contract of yearly renewable term insurance issued to Meyer Wilner during service in the United States Army between September 19, 1917, and March 31, 1919. (R. 1–6.) Meyer Wilner died intestate May 15, 1929. (R. 2.)

The petition as amended (R. 12) alleged further: that the insured became totally and permanently disabled on April 15, 1919 (R. 4); that a demand for insurance benefits was made by the insured November 15, 1928, and by the petitioner May 17, 1929 (R. 4); that no decision was reached by the Veterans' Administration until April 7, 1933; that

then the petitioner was informed that by reason of Section 17 of the Act of March 20, 1933, the Veterans' Administration was without authority to take any action on the claim (R. 5). The petition alleged that the said Act was unconstitutional and void as an attempted delegation to the President of legislative powers contrary to Section 1, Article I of the Constitution, and also that it deprived petitioner of property without due process of law contrary to the Fifth Amendment. (R. 5.)

The respondent filed a general demurrer to the petition (R. 7) which was sustained by the District Court (R. 8–12) and the suit dismissed with costs for want of jurisdiction (R. 13). The Circuit Court of Appeals reversed as to the costs, and directed a dismissal for want of jurisdiction without costs. (R. 21–26.)

ARGUMENT

The main questions for decision in this case are the same as those in *Lynch* v. *United States*, No. 855.

In this case, as in that, the suit was in the District Court under the jurisdiction conferred by Section 19 of the World War Veterans' Act, as amended (petitioner's brief p. 2), which had been repealed before the suit was filed. (R. 2.) In this case also the suit could not have been under the Tucker Act (even if that Act were generally applicable), because it was for more than $10,000 (R. 6), and because the claim is alleged to have matured, by total and permanent disability suffered April 15,

1919, more than six years before the suit was filed. (R. 4.)

The argument made in Point I of the brief for the United States in No. 855 is therefore wholly applicable, and we beg leave to refer to it instead of repeating it at length.

The present petitioner does not seriously dispute the proposition that Congress could withdraw the consent of the United States to be sued on yearly renewable term insurance contracts "by an act devoted to the single purpose of such withdrawal" (petitioner's brief p. 20) but contends that because such withdrawal of consent is part of the general repeal of all laws relating to such insurance, which general repeal the petitioner contends violates the Fifth Amendment, therefore the whole falls.

The difficulty with this is that consent to be sued has clearly and intentionally been withdrawn. (See the legislative history attached as Appendix II to the brief in No. 855.) This being so, and the withdrawal of consent to be sued being unmistakably within the power of Congress, it does not matter what else Congress did at the same time. Consent to be sued, and with it jurisdiction, having been withdrawn, the Court had no power to consider the case further than to dismiss it for lack of jurisdiction, and could never reach the point of considering the other action that the Congress took.

The same applies, with equal force, to the other argument made by the petitioner (brief, pp. 23–42), that other portions of the Act of 1933 contain

unconstitutional delegations of legislative power. In reference to yearly renewable term insurance contracts the provisions of the Act are wholly definite, and delegate nothing whatever to the President. It is clear that the petitioner has no standing to raise the other questions, in which he has no interest, and we therefore refrain from discussing these questions on the merits.

Point II of the Government's brief in No. 855 is not applicable here, for the petition here alleges that the claim of total permanent disability was filed with the Veterans' Bureau November 15, 1928, and was not acted upon prior to the Act of March 20, 1933. (R. 4–5.)

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

J. CRAWFORD BIGGS,
Solicitor General.

WILLIAM STANLEY,
The Assistant to the Attorney General.

WILL G. BEARDSLEE,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
FENDALL MARBURY,
CHARLES BUNN,
Special Assistants to the Attorney General.

MAY 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

Nos. 855 and 861.—October Term, 1933.

855	Margaret Shea Lynch, Petitioner, *vs.* United States of America.	On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
861	Sam Wilner, Petitioner, *vs.* United States of America.	On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 4, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which are here on certiorari, present for decision the same question. In each the plaintiff is the beneficiary under a policy for yearly renewable term insurance[1] issued during the World War pursuant to the War Risk Insurance Act of October 6, 1917, c. 105, Article IV, §§ 400-405. The actions were brought in April, 1933, in federal district courts to recover amounts alleged to be due. In each case it is alleged that the insured had, before September 1, 1919 and while the policy was in force, been totally and permanently disabled; that he was entitled to compensation sufficient to pay the premiums on the policy until it matured by death; that no compensation had ever been paid; that the claim for payment was presented by the beneficiary after the death of the insured; that payment was refused; and that thereby the disagreement arose which the law makes a condition precedent to the right to bring suit. In No. 855, which comes here from the Fifth Circuit, the insured died November 27, 1924. In No. 861, which

[1]Section 404 provides: "That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two, and into other usual forms of insurance. . . ."

comes here from the Seventh Circuit, the insured died May 15, 1929.

In each case, the United States demurred to the petition on the ground that the court was without jurisdiction to entertain the suit, because the consent of the United States to be sued had been withdrawn by the Act of March 20, 1933, c. 3, 48 Stat. 9, commonly called the Economy Act.

The plaintiffs duly claimed that the Act deprived them of property without due process of law in violation of the Fifth Amendment. The district courts overruled the objection; sustained the demurrers and dismissed the complaints. Their judgments were affirmed by the circuit courts of appeals. 67 F. (2d) 490; 68 F. (2d) 442. The only question requiring serious consideration relates to the construction and effect to be given to the clause of § 17 of the Economy Act upon which the Government relies; for the character and incidents of War Risk Insurance and the applicable rules of constitutional law have been settled by decisions of this Court. The clause in question is:

". . . all laws granting or pertaining to yearly renewable term insurance are hereby repealed . . . ."

First. War Risk Insurance policies are contracts of the United States. As consideration for the Government's obligation, the insured paid prescribed monthly premiums. *White* v. *United States*, 270 U. S. 175, 180. True, these contracts, unlike others, were not entered into by the United States for a business purpose. The policies granted insurance against death or total disability without medical examination, at net premium rates based on the American Experience Table of Mortality and three and one-half per cent interest, the United States bearing both the whole expense of administration and the excess mortality and disability cost resulting from the hazards of war. In order to effect a benevolent purpose heavy burdens were assumed by the Government.[2] But

[2]The disbursements to June 30, 1933, for term and automatic insurance (the latter provided for those who were permanently and totally disabled or who died within 120 days after entrance into the service and before making application for term insurance) exceeded the premium receipts by $1,166,939,057. Administrator of Veterans' Affairs, Report for Year 1933, p. 28. The annual cost of administration was estimated at $1,744,038.56. Report of United States Veterans' Bureau for 1922, p. 465. War Risk Insurance was devised in the hope that it would, in large measure, avoid the necessity of granting pensions. Term insurance was issued at a very low premium rate. Over 4,684,000 persons applied before the armistice to the amount of about

the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents.

War Risk Insurance, while resembling in benevolent purpose pensions, compensation allowances, hospital and other privileges accorded to former members of the army and navy or their dependents, differs from them fundamentally in legal incidents. Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller*, 107 U. S. 64, 68; *Frisbie* v. *United States*, 157 U. S. 160, 166; *United States* v. *Cook*, 257 U. S. 523, 527. On the other hand War Risk policies, being contracts, are property and create vested rights. The terms of these contracts are to be found in part in the policy, in part in the statutes under which they are issued and the regulations promulgated thereunder.

In order to promote efficiency in administration and justice in the distribution of War Risk Insurance benefits, the Administration was given power to prescribe the form of policies and to make regulations. The form prescribed provided that the policy should be subject to all amendments to the original Act, to all regulations then in force or thereafter adopted. Within certain limits of application this form was deemed authorized by the Act, *United States* v. *White*, 270 U. S. 175, 180, and, as held in that case, one whose vested rights were not thereby disturbed could not complain of subsequent legislation affecting the terms of the policy. Such legislation has been frequent.[3] Moreover, from time to time, privileges

---

$40,000,000,000 for War Risk term insurance; but over 75 per cent of the men who carried term insurance while in the service never paid a premium after the war. See Report of Bureau of War Risk Insurance for 1920, pp. 5, 7, 41; Report of United States Veterans' Bureau for 1922, p. 456; for 1925, p. 268.

[3]Extension of class of beneficiaries: Acts of June 25, 1918, c. 104, § 2, 40 Stat. 609; Dec. 24, 1919, c. 16, §§ 2, 3, 4, 13, 41 Stat. 371, 375; Aug. 9, 1921, c. 57, § 23, 42 Stat. 147, 155; May 29, 1928, c. 875, § 13, 45 Stat. 964, 967. Upheld: White v. United States, 270 U. S. 175.

Payment where beneficiary dies before exhaustion of policy: e. g., Dec. 24, 1919, c. 16, §§ 15, 16, 41 Stat. 371, 376; Aug. 9, 1921, c. 57, § 26, 42 Stat. 147, 156; June 7, 1924, c. 320, § 26, 43 Stat. 607, 614.

Payment where beneficiary incompetent: e. g., Dec. 24, 1919, c. 16, § 5, 41 Stat. 371; Mar. 2, 1923, c. 173, § 1, 42 Stat. 1374; July 2, 1926, c. 723, § 2, 44 Stat. 790, 791.

granted were voluntarily enlarged and new ones were given by the Government.[4] But no power to curtail the amount of the benefits which Congress contracted to pay was reserved to Congress; and none could be given by any regulation promulgated by the Administrator. Prior to the Economy Act, no attempt was made to lessen the obligation of the Government.[5] Then, Congress, by a clause of thirteen words included in a very long section dealing with gratuities, repealed "all laws granting or pertaining to yearly renewable term insurance". The repeal, if valid, abrogated outstanding contracts; and relieved the United States from all liability on the contracts without making compensation to the beneficiaries.

Second. The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United

---

[4]Reinstatement of lapsed policies: Aug. 9, 1921, c. 57, § 27, 42 Stat. 147, 156; Mar. 4, 1923, c. 291, § 7, 42 Stat. 1521, 1525; July 2, 1926, c. 723, §§ 15, 17, 44 Stat. 790, 799, 800.

Liability undertaken on certain policies which have lapsed through failure of payment of premiums, been cancelled by surrender or estoppel of later contract: e. g., Dec. 24, 1919, c. 16, § 12, 41 Stat. 371, 374; Aug. 9, 1921, c. 57, § 27, 42 Stat. 147, 156; July 3, 1930, c. 849, § 24, 46 Stat. 991, 1001.

Incontestability in favor of insured: Aug. 9, 1921, c. 57, § 30, 42 Stat. 147, 157; July 3, 1930, c. 849, § 24, 46 Stat. 499, 1001.

Administration may waive time for premium payment, grant various tolerances: Aug. 9, 1921, c. 57, §§ 24, 28, 42 Stat. 147, 155, 157; Mar. 4, 1923, c. 291, § 8, 42 Stat. 1521, 1526.

Proceeds exempted from taxation: June 25, 1918, c. 104, § 2, 40 Stat. 609.

The War Risk Insurance Act provided for the conversion of yearly renewable term insurance into level premium insurance at any time within five years from the date of the termination of the war; and The World's War Veterans' Act of June 7, 1924, c. 320, § 304, 43 Stat. 607, 625, provided that all yearly renewable term insurance should cease on July 2, 1926. But provision for extending the period for conversion and for reinstatement were made by later statutes and by regulations issued thereunder: June 2, 1926, c. 449, 44 Stat. 686; May 29, 1928, c. 875, § 14, 45 Stat. 964, 968; July 3, 1930, c. 849, § 22, 46 Stat. 991, 1001; June 24, 1932, c. 276, 47 Stat. 334. See Reports of United States Veterans' Bureau for 1926, pp. 54-56; for 1927, pp. 23-25; Reports of Administrator of Veterans' Affairs for 1931, p. 32; for 1932, p. 42; for 1933, p. 28.

[5]But compare Acts of June 25, 1918, c. 104, § 2, 40 Stat. 609; Aug. 9, 1921, c. 57, § 15, 42 Stat. 147, 152; March 4, 1923, c. 291, § 1, 42 Stat. 1521; March 4, 1925, c. 553, § 3, 43 Stat. 1302, 1303.

States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.[6] That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power.[7]

The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an "Act to maintain the credit of the United States". Punctilious fulfilment of contractual obligations is essention to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation,

[6] Compare United States *v.* Bank of the Metropolis, 15 Pet. 377, 392; Floyd Acceptances, 7 Wall. 666, 675; Garrison *v.* United States, 7 Wall. 688, 690; Smoot's Case, 15 Wall. 36, 47; Vermilye *v.* Adams Express Co., 21 Wall. 138, 144; Cooke *v.* United States, 91 U. S. 389, 396; United States *v.* Smith, 94 U. S. 214, 217; Hollerbach *v.* United States, 233 U. S. 165, 171; Reading Steel Casting Co. *v.* United States, 268 U. S. 186, 188; United States *v.* National Exchange Bank, 270 U. S. 527, 534.

[7] Compare Lottery Case, 188 U. S. 321; Hipolite Egg Co. *v.* United States, 220 U. S. 45, 58; Hoke *v.* United States, 227 U. S. 308, 323; Hamilton *v.* Kentucky Distilling & Warehouse Co., 251 U. S. 146; Calhoun *v.* Massie, 253 U. S. 170, 175. Compare Home Building & Loan Association *v.* Blaisdell, 290 U. S. 398, 430.

with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *The Sinking Fund Cases*, 99 U. S. 700, 719.

Third. Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened.[8] A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi*, decided May 21, 1934. "The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will."[9] The rule that the United States may not be sued without its consent is all embracing.

In establishing the system of War Risk Insurance, Congress vested in its administrative agency broad power in making determinations of essential facts—power similar to that exercised in respect to pensions, compensation, allowances and other gratuitous privileges provided for veterans and their dependents. But while the statutes granting gratuities contain no specific provision for suits against the United States,[10] Congress, as if to emphasize the contractual obligation assumed by the United States when issuing War Risk policies, conferred upon beneficiaries substantially the same legal remedy which beneficiaries enjoy under policies issued by private corporations. The original Act provided in § 405:

"That in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."[11]

Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any

[8] See Worthen Co. v. Thomas, No. 856, decided May 28, 1934; and cases cited by Mr. Justice Sutherland in Home Building & Loan Association v. Blaisdell, 290 U. S. 398.

[9] Hamilton, The Federalist, No. 81.

[10] See Sixth, *infra*, p. 11.

[11] The provision for suit was later modified. See World War Veterans' Act 1924, § 19, as amended by Act of July 3, 1930, c. 849, 46 Stat. 991, 992, under which these suits were brought.

time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. *DeGroot* v. *United States*, 5 Wall. 419, 432. Compare *Darrington* v. *State Bank*, 13 How. 12, 17; *Beers* v. *Arkansas*, 20 How. 527-529; *Gordon* v. *United States*, 7 Wall. 188, 195; *Railroad Company* v. *Tennessee*, 101 U. S. 337; *Railroad Commission* v. *Alabama*, 101 U. S. 832; *In re Ayers*, 123 U. S. 443, 505; *Hans* v. *Louisiana*, 134 U. S. 1, 17; *Baltzer* v. *North Carolina*, 161 U. S. 240; *Baltzer & Taaks* v. *North Carolina*, 161 U. S. 246.[12] The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *DeGroot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Babcock*, 250 U. S. 328, 331; and to those arising from some violation of rights conferred upon the citizen by the Constitution, *Schillinger* v. *United States*, 155 U. S. 163, 166, 168. The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away.

Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock*, 250 U. S. 328, 331. It may limit the individual to administrative remedies. *Tutun* v. *United States*, 270 U. S. 568, 576. And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfilment without the interposition of either a court or an administrative tribunal.

Fourth. The question requiring decision is, therefore, whether in repealing "all laws granting or pertaining to yearly renewable term insurance" Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right;

[12] Compare also Imhoff-Berg Silk Dyeing Co. *v.* United States, 43 F. (2d) 836, 841; Synthetics Patent Co. *v.* Sutherland, 22 F. (2d) 491, 494; Kogler *v.* Miller, 288 Fed. 806.

and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States.[13] As Congress took away the contractual right it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of § 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by § 405 of the Act of 1917, which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obviously, Congress did not intend to repeal generally the section providing for suits.[14] For in March 1933, most of the policies then outstanding were "converted" policies, in no way affected by the Economy Act.[15]

That Congress sought to take away the right of beneficiaries of yearly renewable term policies and not to withdraw their privilege to sue the United States, appears, also, from an examination of the other provisions of § 17. The section reads:

"All public laws granting medical or hospital treatment, domiciliary care, compensation and other allowances, pensions, disability allowance, or retirement pay to veterans and the dependents of veterans of the Spanish-American War, including the Boxer Rebellion and the Philippine Insurrection, and the World War, or to former members of the military and naval service for injury or disease incurred or aggravated in the line of duty in the military or naval service (except so far as they relate to persons who served prior to the Spanish-American War and to the dependents of such persons, and the retirement of officers and enlisted men of the Regular Army, Navy, Marine Corps, or Coast Guard) are hereby repealed, and all laws granting or pertaining to yearly renewable term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this Act is enacted."[16]

---

[13] Veteran Regulation No. 8, promulgated March 31, 1933, pursuant to this Act provides: "V. Except as stated above [matter not here relevant] no payment may hereafter be made under contracts of yearly renewable term insurance (including automatic insurance) and all pending claims or claims hereafter filed for such benefits shall be disallowed."

[14] See Note 11.

[15] The number of "converted" policies in force June 30, 1933, was 616,069. Administrator of Veterans' Affairs, Report for 1933, pp. 25, 27.

[16] The rest of the section is as follows:

"The Administration of Veterans' Affairs under the general direction of the President shall immediately cause to be reviewed all allowed claims under

That section deals principally with the many grants of gratuities to veterans and dependents of veterans. Congress apparently assumed that there was no difference between the legal status of these gratuities and the outstanding contracts for yearly renewable term insurance. It used in respect to both classes of benevolences the substantially same phrase. It repealed "all public laws" relating to the several categories of gratuities; and it repealed "all laws granting or pertaining to" such insurance. No right to sue the United States on any of these gratuities had been granted in the several statutes conferring them; and the right to the gratuity might be withdrawn at any time. The dominant intention was obviously to abolish rights, not remedies.

That Congress intended to take away the right under outstanding yearly renewable term policies, and was not concerned with the consent to sue the United States thereon, appears also from the saving clauses in § 17. These provide that "all allowed claims under the above referred to laws" are to be reviewed and the benefits are to be paid "where a person is found entitled under this Act"; and that "nothing contained in this section shall interfere

---

the above referred to laws and where a person is found entitled under this Act, authorize payment or allowance of benefits in accordance with the provisions of this Act commencing with first day of the fourth calendar month following the month during which this Act is enacted and notwithstanding the provisions of section 9 of this Act, no further claim in such cases shall be required. *Provided*, That nothing contained in this Section shall interfere with payments heretofore made or hereafter to be made under contracts of yearly renewable term insurance which have matured prior to the date of the enactment of this Act and under which payments have been commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending: *Provided further*, That subject to such regulations as the President may prescribe, allowances may be granted for burial and funeral expenses and transportation of bodies (including preparation of the bodies) of deceased veterans of any war to the places of burial thereof in a sum not to exceed $107 in any one case.

"The provisions of this title shall not apply to compensation or pension (except as to rates, time of entry into active service and special statutory allowances) being paid to veterans disabled, or dependents of veterans who died, as the result of disease or injury directly connected with active military or naval service (without benefit of statutory or regulatory presumption of service connection) pursuant to the provisions of the laws in effect on the date of enactment of this Act. The term 'compensation or pensions' as used in this paragraph shall not be construed to include emergency officer's retired pay referred to in section 10 of this title."

with payments to be made under contracts of yearly renewable term insurance under which payments have commenced, or on any judgment heretofore rendered in a court of competent jurisdiction in any suit on a contract of yearly renewable term insurance, or which may hereafter be rendered in any such suit now pending." That is, the rights under certain yearly renewable term policies are excepted from the general repealing clause.[17]

Fifth. There is a suggestion that although, in repealing all laws "granting or pertaining to yearly renewable term insurance", Congress intended to take away the contractual right, it also intended to take away the remedy; that since it had power to take away the remedy, the statute should be given effect to that extent, even if void insofar as it purported to take away the contractual right. The suggestion is at war with settled rules of construction. It is true that a statute bad in part is not necessarily void in its entirety. A provision within the legislative power may be allowed to stand if it is separable from the bad. But no provision however unobjectionable in itself, can stand unless it appears both that, standing alone, the provision can be given legal effect and that the legislature intended the unobjectionable provision to stand in case other provisions held bad should fall. *Dorchy* v. *Kansas*, 264 U. S. 286, 288, 290. Here, both those essentials are absent. There is no separate provision in § 17 dealing with the remedy; and it does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment.

War Risk Insurance and the war gratuities were enjoyed, in the main, by the same classes of persons; and were administered by the same governmental agency. In respect of both, Congress had theretofore expressed its benevolent purpose perhaps more generously than would have been warranted in 1933 by the financial condition of the Nation. When it became advisable to reduce the Nation's existing expenditures, the two classes of benevolences were associated in the minds of the legislators; and it was natural that they should have wished to subject both to the same treatment. But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized that these had contractual rights. It is, at least, as probable that Congress overlooked the fundamental difference in legal

[17] Compare Veteran Regulation No. 8, March 31, 1933.

incidents between the two classes of benevolences dealt with in § 17 as that it wished to evade payment of the Nation's legal obligations.

Sixth. The judgments below appear to have been based, in the main, not on § 17 of the Economy Act, but on § 5 which provides:

"All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

This section, as the Solicitor General concedes, does not relate to War Risk Insurance. It concerns only grants to veterans and their dependents—to pensions, compensation allowances and special privileges all of which are gratuities. The purpose of the section appears to have been to remove the possibility of judicial relief in that class of cases even under the special circumstances suggested in *Crouch* v. *United States*, 266 U. S. 180; *Silberschein* v. *United States*, 266 U. S. 221; *United States* v. *Williams*, 278 U. S. 255; *Smith* v. *United States*, 57 (2d) 998. Compare *United States* v. *Meadows*, 281 U. S. 271.

Seventh. The Solicitor General concedes that in No. 861 no question is presented except that of jurisdiction dependent upon the construction of the clause in § 17 of the Economy Act discussed above. He contends in No. 855, that if jurisdiction is entertained, the demurrer should be sustained on the ground that the complaint fails to set forth a good cause of action, since it fails to show that the suit was brought within the period allowed by law. This alleged defect was not pleaded or brought to the attention of either of the courts below. Nor was it brought by the Solicitor General to the attention of this Court when opposing the petition for a writ of certiorari. We do not pass upon that question, which like others relating to the merits, will be open for consideration by the lower courts upon the remand.

Eighth. Mention should be made of legislation by Congress enacted since the commencement of these suits.

1. Act of June 16, 1933, c. 101, § 20, 48 Stat. 309 provides:

"Notwithstanding the provisions of Section 17, title I, Public Numbered 2, Seventy-third Congress, any claim for yearly renewable term insurance on which premiums were paid to the date of the death of the insured . . . . under the provisions of law repealed by said section 17 wherein claim was duly filed prior to

March 20, 1933, may be adjudicated by the Veterans' Administration on the proofs and evidence received by Veterans' Administration prior to March 20, 1933, and any person found entitled to the benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws. . . ."

2. Section 35 of the Independent Offices Appropriation Act of 1935, passed on March 27-28, 1934, over the President's veto, provides:

"That notwithstanding the provisions of Section 17 of title I, of an Act entitled "An Act to maintain the Credit of the United States Government" approved March 20, 1933 and Section 20 of an Act entitled "An Act making appropriations for the Executive offices, etc. . . ." approved June 16, 1933; any claim for renewable term insurance under the provisions of laws repealed by Section 17, wherein claim was duly filed prior to March 20, 1933, and on which maturity of the insurance contract had been determined by the Veterans' Administration prior to March 20, 1933, and where payments could not be made because of the provisions of the Act of March 20, 1933, or under the provisions of the Act of June 16, 1933, may be adjudicated by the Veterans' Administration and any person found entitled to yearly renewable term insurance benefits claimed shall be paid such benefits in accordance with and in the amounts provided by such prior laws."[18]

The provision in the Act of June 16, 1933, which was enacted before the entry of judgments by the district courts, does not appear to have been considered by the lower courts. The provision in the Act of March 27-28, 1934, was enacted after the filing in this Court of the petitions for certiorari but before the writs were granted. As neither of these Acts was referred to by the Solicitor General or by counsel for the petitioners, we assume that there is nothing in them, or in any action taken thereunder, which should affect the disposition of the cases now before us. Any such matter also will be open for consideration by the lower courts upon the remand.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[18]See instructions issued April 11, 1934, by the Administrator of Veterans' Affairs, pursuant to the Act of March 27-28.